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IN THE

Supreme Court of The United States

71-3

POP POPPENHEIMER ET AL
PLAINTIFFS-PETITIONERS

V.

THE STATE OF TENNESSEE, acting
through its agents and arms,
THE CITY OF MEMPHIS, TENNESSEE,
THE COUNTY OF SHELBY, TENNESSEE, ET AL
DEFENDANTS-RESPONDENTS

PETITION
FOR
WRIT OF CERTIORARI

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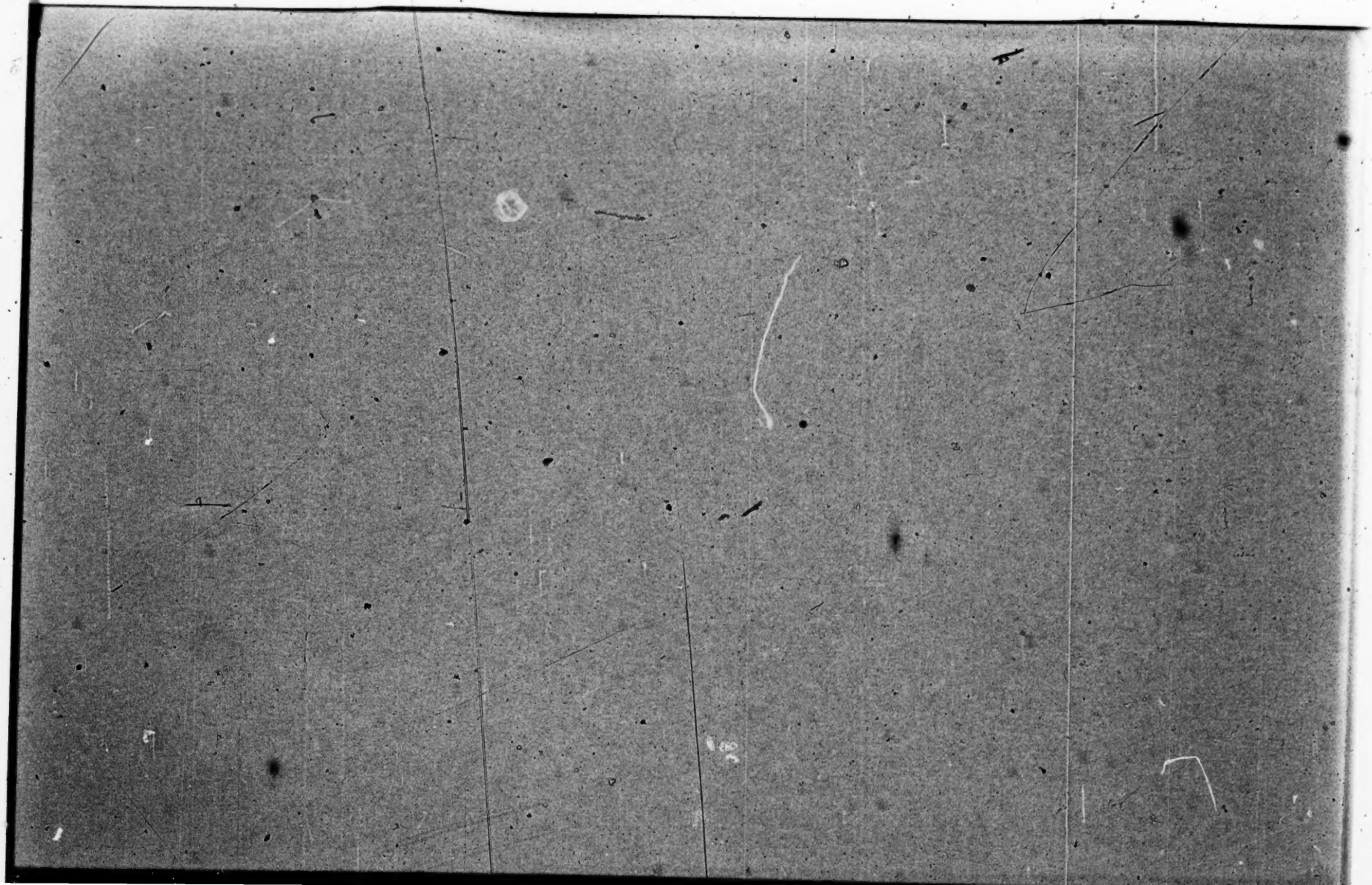

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PETITION

A. This is a Petition for Writ of Certiorari to review the Final Order of the United States Court of Appeals for the Sixth Circuit in the case of Pop Poppenheimer et al versus the State of Tennessee et al.

B. The grounds on which the jurisdiction of this Court is invoked are:

1. The Final Order sought to be reviewed was filed on 9 April 1971.

2. The Statutory Authority believed to confer Jurisdiction on this Court is 28 U. S. C. 1254.

C. The question presented is:[1, 2]

Is the **factual** abridgment of the Plaintiffs' rights

[1]There are two subordinate procedural questions presented: (1) res judicata as a collateral estoppel and (2) impartial tribunal-opportunity to be heard. The former is directly related to the substantive question, supra, and it is presented in F. 3. b., infra. The former is not directly related to the substantive question, supra, and is: Can the District Court grant the right to argue its Motion to one party (the Defendants and their Motions to Dismiss) and pre-emptorily deny the right to argue its Motion to another party (the Plaintiff and its Motion for Summary Judgment) at a hearing set by the Court for the hearing of **both** Motions, or is Plaintiff entitled to an opportunity to be heard on its Motion (as opposed to being limited to rebuttal of Defendants' Motions)? The facts are that the District Court denied the Plaintiffs an opportunity to be heard at a hearing set for that purpose by adjourning the hearing at the conclusion of the argument on the Defendants' Motions to Dismiss (the Court thereby limited the hearing to argument on Defendants' Motions to Dismiss and Plaintiff's Rebuttal thereto) vis a vis the Plaintiff's immediately questioning the Court's action, requesting and receiving permission to approach the Bench, and, in the presence of the Attorney for the Defendant Shelby County Board of Education, was told by the Court that it considered the argument given on Defendants' Motions to Dismiss as equivalent to argument on Plaintiff's Motion for Summary Judgment. Shortly thereafter the District Court issued its **Order Granting Motions to Dismiss** and by this—in accordance with Rule 41(b) of the **Federal Rules of Civil Procedure**—the Court had decided the case against the Plaintiff on the merits without the Plaintiff's ever having had an opportunity to be heard.

[2]Since the Court of Appeals adopted the Opinion of the District Court as its own Opinion, the questions are presented generally in terms of the errors of the District Court, if any, which were adopted by the Court of Appeals.

to vote by the Defendants' respective Systems of Apportionment equivalent to the **legal** abridgment of the Plaintiffs' rights to vote?

D. The Constitutional and Statutory Provisions involved:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence. **United States Constitution,** Art. IV, Sec. 4.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval force, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. **Ibid,** Amendment V.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. **Ibid,** Amendment XIV.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

Section 2. The Congress shall have power to en-

force this article by appropriate legislation. **Ibid,** Amendment XV.

How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present

all material made pertinent to such a motion by Rule 56. **Fed. Rules Civ. Proc.,** Rule 12(b).

E. The Facts Material to the Questions Presented are:

1. General

This is a Civil Rights suit originally brought in the District Court pursuant to the provisions of 28 U. S. C. 1343 (3) and (4), 1344, 2201, 2202, 2281-4, and 42 U. S. C. 1988 as a suit in Equity authorized by 42 U. S. C. 1983 to redress the denial and abridgment —under color of state law, historical custom, and contemporary policy—of constitutional voting rights secured to all citizens of the United States by the Supreme Court in its function as interpreter of the U. S. Constitution, Art. 4, Sec. 4 and Amendments 14 and 15, and 42 U. S. C. 1981. **Complaint,** p. 1.

2. On 21 April 1970, Plaintiffs filed their Original Complaint based upon the following facts:

a. THE COUNTY COURT: THE LEGISLATIVE BODY OF SHELBY COUNTY. The system of distribution of the legislators of the County Court on the basis that ". . . incorporated towns are entitled to at least one Justice of the Peace **regardless of population"** was found, by a U. S. District Court in 1968, not to meet U. S. Constitutional requirements, **Hyden v. Baker,** 286 F. Supp. 475 at 484 (M. D., Tenn., 1968). The Court subsequently approved a "mixed"

system of distribution of legislators submitted by the parties that was purportly based upon **Dusch v. Davis,** 387 U. S. 112 and that provided for seven (7) district and four (4) at-large legislators. The system — approved as to structure, but not approved as to prospective operation, by the Court — has since operated with the following effects:

(1.) RACE DISCRIMINATION?

Given (a) the mixed district and at-large system of distribution of legislators, **supra,** (b) a Southern population of 61.4-38.6 percent white and black, respectively, (c) historical bloc voting by whites and blacks for white and black legislative candidates, repectively, (d) geographic concentration of residence by race —which allowed the collection of the black minority into fewer districts—the electoral yield was **one** black legislator or 9.1 percent of the eleven total legislators vis a vis the aforestated black actual population of 38.6 percent. **Complaint,** pp. 5-8.

(2.) GEOGRAPHIC OR PLACE DISCRIMINATION?

Six of the eleven legislators , or 54.5 percent, reside in districts containing a minority of 37.1 percent of the actual county population. **Complaint,** pp. 5-8.

The actual population of the one **rural** district (District 1 with 132,720 people) is 39.5 percent greater than the actual population **average** for the six **urban**

districts (Districts 2-7 with an average of 95,174 people each), and the one rural district is 57.4 percent larger than the smallest urban district (District 4). **Ibid.**

(3.) UNEQUALLY POPULATED DISTRICT DISCRIMINATION?

(a) Districts 1-7 vary in actual population from the average or ideal population district by +32.01%, +1.16%, —9.25%, —16.14%, +0.63%, +6.30%, and —14.69, respectively. **Complaint, pp. 5-8.**

(b) The percentage variance between the largest population district with 132,720 people (District 1) and the average or ideal population district of 100,538 people is 32.01 percent. **Ibid.**

(c) The percentage variance between the smallest population district with 84,305 people (District 4) and the average or ideal population district of 100,538 is 16.14 percent. **Ibid.**

(d) The absolute percentage variance between the largest and smallest districts in terms of the average or ideal district, **supra,** is 48.2 percent. **Ibid.**

(e) The absolute percentage variance be-

tween the largest and smallest districts **per se** is 57.4 percent, the largest district having 48,415 more people than the smallest district, and the largest district being more than one and one-half times larger than the smallest district. **Ibid.**

b. THE COUNTY BOARD OF EDUCATION. The County Board of Education—being appointed by the County Court, **supra**—is dependent in its constitutionality upon the constitutionality of said County Court. **Complaint,** pp. 9-10.

c. THE CITY COUNCIL: THE LEGISLATIVE BODY OF THE CITY OF MEMPHIS. The City Council has a "mixed" system of distribution of legislators of seven (7) districts and six (6) at-large that has operated with the following effects:

(1.) RACE DISCRIMINATION?

Given (a) the mixed district and at-large system of distribution of legislators, **supra,** (b) a Southern population of 60.3-39.7 percent white and black, respectively, (c) historical bloc voting by whites and blacks for white and black legislative candidates, respectively, (d) geographic concentration of residence by race—which allowed the collection of the black minority into fewer districts—the electoral yield was **three** black legislators or 23.1 percent of the thirteen

total legislators vis a vis the aforestated black actual population of 39.7 percent. **Complaint,** pp. 11-14.

(2.) GEOGRAPHIC OR PLACE DISCRIMINATION?

Eight, or 61.5 percent, of the thirteen legislators reside in two of the seven districts containing a minority of 25.4 percent of the actual city population. **Complaint,** pp. 11-14.

Six of the thirteen legislators, or 46.2 percent, all reside in two of the 163, or 1.2 percent, of the total city precincts; **i.e.** Precincts 16-2 and 57. **Ibid.**

Four of the thirteen legislators, or 30.8 percent, all reside in one of the 163, or 0.6 percent, of the total city precincts; **i.e.** Precinct 57. **Ibid.**

(3.) UNEQUALLY POPULATED DISTRICT DISCRIMINATION?

(a) Districts 1-7 vary in actual population from the average or ideal population district by +2.46%, —13.42%, —6.16%, —1.24%, —8.47%, + 9 . 0 2 %, and +17.77%, respectively. **City of Memphis' Amended Motion To Dismiss.**

(b) The percentage variance between the largest population district with 101,146 people (District 7) and the average or

ideal population district of 85,880 people is 17.8 percent. **Ibid.**

(c) The percentage variance between the smallest population district with 74,363 people (District 2) and the average or ideal population district of 85,880 people is 13.4 percent. **Ibid.**

(d) The absolute percentage variance between the largest and smallest districts in terms of the average or ideal district, **supra,** is 31.2 percent. **Ibid.**

(e) The absolute percentage variance between the largest and smallest districts **per se** is 36.0 percent, the largest district having 26,783 more people than the smallest district, and the largest district being one and one-third times larger than the smallest district. **Ibid.**

d. THE CITY BOARD OF EDUCATION. The City Board of Education has an "at-large" system of distribution of school board representatives of five (5) at-large that has operated with the following effects:

(1.) RACE DISCRIMINATION?

Given (a) the "at-large" system of five at-large school board representatives, **supra,** (b) a Southern population of 60.3-39.7 percent white and black. re-

spectively, (c) historical bloc voting by whites and blacks for white and black school board candidates, respectively, the electoral yield was, and always has been throughout history, **zero** black school board representatives vis a vis the aforestated actual population of 39.7 percent black and the existing school children enumeration of 51.8 percent black. **Complaint**, pp. 15-17.

(2.) GEOGRAPHIC OR PLACE DISCRIMINATION?

Five of the five school board representatives or 100.0 percent—superimposing the City Council districts on the City Board of Education School District of the City of Memphis for illustration only—reside in districts containing a minority of 40.1 percent of the actual city population. **Complaint**, pp. 15-17.

e. ALL DEFENDANT BODIES, RACE LITERACY DISCRIMINATION? Let counsel for the defendants answer, as officers of this Court, **the real reason** that Chapter 50 of the Public Acts of Tennessee, 1967, was initiated by, named after, and passed at the influence of Memphis and Shelby County legislators in the Tennessee legislature? See Exhibit XV. See also, for the individual effort thereof, Exhibit XVI.

Plaintiffs asked the Court:

1. to declare by judgment the constitutional rights and duties of the parties to the case at bar;

2. to order the Defendants to change from their existing system of distribution of legislators and representatives to a constitutional system immediately;

3. to order an election based on the constitutional system with the successful candidates to take office immediately upon certification of the vote. **Complaint,** pp. 20-22.

3. On 18, 22, and 26 April 1970, Defendants filed their respective Motions to Dismiss Plaintiffs' Complaint, stating, in the case of the Defendants City of Memphis and the City Board of Education, that the Complaint failed to state a claim on which relief could be granted, and, raising, in the case of the Defendant Shelby County, the defense of res judicata; which defense was that "the issues raised therein have been previously adjudicated." **Motions to Dismiss.**

4. On 3 June 1970, Plaintiff filed its Motion for Summary Judgment.

5. On 2 July 1970, the Court—having given notice and ordered a hearing on both Plaintiff's Motion for Summary Judgment and Defendants' Motions to Dismiss—heard Defendants' argument on their Motions to Dismiss (and Plaintiff's Rebuttal thereto) and

then, without explanation, adjourned the hearing without hearing Plaintiff's argument on its Motion for Summary Judgment (or Defendants' Rebuttal thereto) vis a vis Plaintiff's immediately questioning the Court's adjournment of the hearing, requesting and receiving permission to approach the Bench, and, in the presence of the Attorney for the Defendant Shelby County Board of Education, was told by the Court that it considered the argument given on the Defendants' Motions to Dismiss as equivalent to argument on Plaintiff's Motion for Summary Judgment.

6. On 14 July 1970, the Court issued its Order Granting Motions to Dismiss.

7. On 30 July 1970, Plaintiff—the jurisdictional question being unsettled — filed protective Appeals to both the U. S. Supreme Court and the U. S. Court of Appeals (6th Cir.).

8. On 19 October 1970, the U. S. Supreme Court dismissed Plaintiff's appeal subject to the U. S. Court of Appeal's determination of appropriate jurisdiction under **Schackman v., Arnebergh,** 387 U. S. 427 (1967).

9. On 3 November 1970—after Motion for determination of jurisdiction by Plaintiffs—the U. S. Court of Appeals (6th Circuit) decided this jurisdiction was properly there.

10. On 30 March 1971, the U. S. Court of Appeals heard the case at bar.

11. On 9 April 1971, the U. S. Court of Appeals filed its Order affirming the U. S. District Court's Order dismissing Plaintiffs' Complaint.

THIS PETITION IS FOR A WRIT OF CERTIORARI TO REVIEW THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, **supra.**

F. THE ARGUMENTS

1. The Facts, The Law, The Question

There is no dispute between the Plaintiffs and the Defendants over the facts alleged in Plaintiffs' Complaint. Defendants' Motions to Dismiss being treated as a Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment affirm this.

There is dispute between the Plaintiffs and the Defendants over the law.

The sine qua non question, then, is: Is the **factual** abridgment of the Plaintiffs' rights to vote by the Defendants' respective Systems of Apportionment,[1]

[1]For a conceptual analytic geometric proof of the factual relative abridgment of the Plaintiffs' rights to vote on a racial basis by the Defendants' respective Systems of Apportionment, supra, see **Exhibits I-III.**

For an analytic geometric proof of the factual relative abridgment, see **Exhibits IV-VI.** For a mathematical proof, see **Exhibits VII-IX.** For the **actual** population figures based upon the 1960 U. S. Census and the 1967 U. S. Special Census of Memphis, see **Exhibits X-XII.** For the comparison of the 1966 and 1969 apportionments of the City of Memphis City Council, see **Exhibit XIII.** For the geographic concentration of residence by race, see **Exhibit XIV.**

supra, equivalent to the **legal** abridgment of Plaintiffs' rights to vote?

If ". . . the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment," **Reynolds v. Sims**, 377 U. S. 533 at 565-566 (1963), do the Systems, supra, achieve fair and effective representation . . . . . for all races . . . for all places? **Ibid**, at 568.

The results of the "Mixed" Systems of Apportionment of the County Court and the City Council, and the "At-Large" System of Apportionment of the City Board of Education, in terms of representation, are explicit, supra.

With a population, in terms of race, that is approximately 60 percent white and 40 percent black, is the County Court's 9.1 percent black representation . . . the City Council's 23.1 percent black representation . . . the City Board of Education's ZERO[2] black rep-

[2]51.8 percent of all the children in the City of Memphis School System today are black, yet there has never been a black representative on the School Board. Is not a black parent just as concerned for his black child as a white parent is concerned for his white child?

resentation . . . . . "fair and effective representation"?[3, 4]

In terms of geographic place, is 46.2 percent of the City Council being from 1.2 percent of the total precinct districts, and 30.8 percent being from 0.6 percent . . . "fair and effective" representation?[5]

Continuing, in terms of geographic place, is the one **rural** district of the County Court being 57.4 percent larger in population than the smallest **urban** district of the County Court . . . "fair and effective" representation?[6]

[3]There are no black "at-large" representatives today . . . and there never have been any in the history of Memphis. "Voters who are members of a racial minority might well be . . . in a decided minority in the county as a whole. This . . . could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting," **Allen v. Board of Elections,** 393 U. S. 544 at 569 (1969). **Cf. Avery v. Midland County,** 390 U. S. 474 at 481, **note** 6 (1968). "A multi-member scheme that functions, either casually or purposefully, to minimize a cognizable minority's voting strength is a violation of the Equal Protection of the Law Clause," **Burns v. Richardson,** 384 U. S. 73 at 88 (1966).

[4]"As the ("mixed" single member and multi-member district) plan becomes effective, if it then operates to minimize or cancel out the voting strength of racial . . . elements . . . it will be time enough to consider whether the system still passes constitutional muster" (parenthesis supplied), **Dusch v. Davis,** 387 U. S. 112 at 117 (1967).

[5]"It is the distribution of legislators . . . that must satisfy the demands of the Equal Protection Clause,". **Burns v. Richardson,** 384 U. S. 73 at 77, **note** (1966). See also **Burns** at 88 and 93. **Cf. Hadley v. Jr. College District of Kansas City,** 397 U. S. 50 (1970).

[6]**Ibid.**

Also, in terms of geographic place, is 54.5 percent of the County Court being from districts containing 37.1 percent of the actual population . . . is 61.5 percent of the City Council being from districts containing 25.1 percent of the actual population . . . is 100.0 percent of the City Board of Education being from (superimposed City Council) districts containing 40.1 percent of the actual population . . . "fair and effective" representation?[7]

In terms of 'as nearly as practicable districts', does the County Court's largest district being 57.4 percent larger in actual population than its smallest district . . . and the City Council's largest district being 36.0 percent larger in actual population than its smallest district . . . achieve "fair and effective" representation?[8]

[7]**Ibid.**

[8]". . . the 'as nearly as practicable standard' requires that the State make a good faith effort to achieve precise mathematical equality," **Kirkpatrick v. Preisler**, 394 U. S. 526 at 530-1 (1969), and ". . . it seems quite obvious that the State could have come much closer to providing districts of equal population than it did," **Ibid.**, at 532. (The court majority found that the percentage variance between the average or "ideal" population district and the largest and smallest population districts of 3.13% and 2.84% respectively—or an **absolute** percentage variance of 5.97% between the largest and smallest districts in terms of the average or ideal district—was unconstitutional, **Ibid.**, at 528-30; the court minority stated that a percentage variance between the largest and smallest population districts per se of ". . . no more than 10% to 15% . . ." would be satisfactory to them," **Ibid.**, at 553-4.).

2. The People. The Time, The Policy

Plaintiffs respectfully submit that the questions presented herein are so substantial as to require plenary review by the United States Supreme Court for the following, among other, reasons:

Defendant Shelby County, including Defendant City of Memphis, is larger in population than any of the following nine states of Vt., N. Dak., S. Dak., Del., Mont., Idaho, Wyo., Nev., Alaska according to the U. S. Bureau of the Census, so a substantial number of human beings are involved — approximately 40 percent being Negro — which, in the judgment of Plaintiff, warrants at least a review by the court of last resort.

The lower Courts disregarded the law established by the Supreme Court that constitutional rights are rights of the ". . . here and now . . .," **Watson v. Memphis,** 373 U. S. 526 at 533 (1963), and adopted the position of the Defendants, struck down by the Supreme Court in **Watson, supra,** that delay is appropriate for the constitutional rights at issue.

The delay wrought by the lower Courts, in the case of the Defendant Shelby County, is seven more years of gross inequality of representation; **viz.** the Defendant Shelby County Quarterly Court is not required by existing Tennessee law to **apportion** again until the year 1974, which means that the 1972 **election**

will be based on the existing scheme of distribution of legislators and, further, since the next **election** is not until 1978, this means that 1978 is the first **election** that will be held on an **apportionment** different from the existing **apportionment** of legislators.[1]

Defendants' contemporary policy of "respect of persons," evinced by the factual unequal population district, geographic place, and race discriminations, supra, is based upon the City of Memphis' and Shelby County's historical policy of pre-judging a human being, not on his merit or lack of merit, but by the color of his skin.

This Court has described this policy as "The City of Memphis has effected, continues to effect, and claims the right or need to prolong patently unconstitutional racial discriminations violative of now long declared and well established individual rights," **Watson v. Memphis,** 373 U. S. 526 at 533 (1963). See also, **Turner v. Memphis,** 369 U. S. 350 (1961).

The multiplicity of suits arising out of Memphis

[1]The dates of election, above, are based on the Tennessee law of six-year terms, and the dates of apportionment, above, result from the fact that, by Shelby County Quarterly Court **Resolution,** 10 September 1968 (an exhibit to the Defendant Shelby County's pleadings in the Record on Appeal), Shelby County has **already apportioned under T. C. A. 5-111 cited by Defendant (T. C. A. 5-110 is also involved)** and is, accordingly, under no obligation to apportion again for six years from that date, or 1974. Further, **Chapter 272 of the Public Acts of 1969**—not cited by Defendant—hardened the apportionment under the plan approved by Hyden v. Baker into public law and **requires that said Hyden apportionment be the basis for the 1972 election. Chapter 272 of the Public Acts of Tennessee of 1969,** Sections 1, 5, and 6.

and Shelby County, Tennessee, on the issue of their and the State's systems of apportionment manifests the Defendants' policy in the local and state legislatures of 'inch by inch, minute by minute' defense of the doctrine of unequal protection of the law.[2]

This prolongation of the non-effectuation of constitutional rights for all men regardless of the color of their skin—when given the sanction and support of law as the lower Courts have done—tends to undermine confidence in our system of justice, to odiumize all decent people, to excite those whose constitutional rights are denied, to frustrate responsible hope, to perpetuate notions of superiority and inferiority based upon race, to encourage the polarization of communities, to aggravate dormant violence, and, ultimately, to lead to tragedies such as the assassination of Dr. Martin Luther King which occurred in this community on 4 April 1968.

One can only wonder 'how long' man's inhumanity to man will continue . . . and it will continue here, in Memphis and Shelby County, Tennessee, until and

[2]**Baker v. Carr, 175 F. Supp. 649 (1959), Ibid., 179 F. Supp. 824 (1959), Ibid., 369 U. S. 186 (1962), Ibid., 206 F. Supp. 341 (1962), Ibid., 222 F. Supp. 684 (1963), Ibid., 247 F. Supp. 629 (1965); Baker v. Clement, 247 F. Supp. 886 (1965); Baker v. Ellington, 273 F. Supp. 174 (1967); Hyden v. Baker, 286 F. Supp. 475 (1968)—where the "Baker" part of the citation is Mr. Charles Baker of Shelby County—Turner v. City of Memphis, 199 F. Supp. 585 (1961), Ibid., 369 U. S. 350 (1962); Watson v. Memphis, 303 F. 2d 863 (1962), Ibid., 373 U. S. 526 (1963); and this suit, Poppenheimer v. Tennessee.**

unless this Court intervenes in the Cause of Justice. Won't this Court hear the plea of the people of Memphis, and Shelby County, Tennessee?

3. The Lower Courts

a. General

The United States Court of Appeals for the Sixth Circuit, Cincinnati, Ohio, affirmed the United States District Court (W.D., Tenn.), Memphis, Tennessee, ". . . for the reasons stated in the memorandum of Judge Bailey Brown . . . ."; it, therefore, rendered no separate Opinion but adopted the Opinion of the U. S. District Court.

Since the Opinion of the U. S. District Court is, accordingly, the Opinion of the two lower courts, Plaintiffs will generally refer to same singularly as the lower Court Opinion.

It is respectfully called to the attention of this Court that the U. S. District Court, for whatever reason, cited no legal authority in its Opinion on the substantive[1] issues of the case at bar.

[1]The lower Court, in its Opinion, cited "**Hyden v. Baker, 286 F. Supp. 475 (M.D., Tenn., 1968),**" for its presumed **factual** sameness with Plaintiffs' case against the Defendant Shelby County on the procedural issue of res judicata, **but not as legal authority for its decision.**

b. The Plaintiffs and the Defendant Shelby County Quarterly Court

General.

The Defendant Shelby County raised the defense of res judicata as a collateral estoppel[2] in its Motion to Dismiss Plaintiffs' Complaint by stating, "The issues raised in the Complaint as to the unconstitutional malapportionment of the Shelby County Quarterly Court have heretofore been adjudicated by the Three-Judge Court in the case of **Hyden v. Baker,** 286 F. Supp. 475 (M.D., Tenn., 1968)." **Shelby County Motion to Dismiss.**

[2]Plaintiffs will meet Defendant Shelby County's defense of estoppel, infra; however, Plaintiffs wonder if Shelby County should not be estopped from alleging estoppel. Do they come as equity would have them come? The apportionment plan that Shelby County submitted to the **Hyden v. Baker** court in 1968—which was approved by the Court at the urging of both the Plaintiff Hyden et al and the Defendant Baker et al (Hyden was and is Commissioner of, and Baker was and is Chairman of, the **Defendant Shelby County** in the case at bar)—was not based upon either the United States **1960** census figures nor the United States **1967** special census figures but, instead, was based upon **registered voters.**

Why would Shelby County present a plan based upon registered voter figures when actual population figures were available? Since it was and is true that there is a greater percentage of white registered voters than black registered voters, would this tend ". . . to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or to perpetuate a ghost of prior malapportionment"? **Burns v. Richardson,** 384 U. S. 73 at 92-93.

The principle of Burns, supra, ignored by the **Hyden** court, proved true in Shelby County, Tennessee. The following County Court election yielded 10 white and 1 black legislators vis a vis a 3 to 2 white and black acual population. **Complaint,** pp. 5-8. This is the same plan, supra, in effect until **1978. Cf.** ". . . the best population data available in the legislature in **1967,** the **1960** United States census figures . . . the General Assembly had not in fact relied on . . . but instead had based its plan on less accurate data," **Kirkpatrick v. Preisler,** 394 U. S. 526 at 528-529.

The lower Court granted Defendant Shelby County's Motion to Dismiss, stating, ". . . this question is now res judicata by virtue of the decision in **Hyden v. Baker,** 286 F. Supp. 475 (M.D., Tenn., 1968)." **Order,** 14 July 1970.

The lower Court, it is respectfully submitted, erred in granting Defendant Shelby County's Motion to Dismiss for the following reasons:

(1) The lower Court's judgment is, (a) a violation of Rules 8(c) and 12(b) of the Federal Rules of Civil Procedure, **Fed. Rules Civ. Proc., Rule 8(c) and Rule 12(b),** and (b) reversible error. See, for a full discussion thereof, **Guam Investment Company v. Central Building, Inc.,** 288 F. 2d 19 at 23-24. See, in accord, **2 Freeman on Judgments** (5th ed.), Sec. 798, pp. 1693-1694. **Cf.** Rule 19b of the **Rules of the United States Supreme Court.**

The rationale of the Guam et al rule embodied in Rules 8(c) and 12(b) is the historical legal premise that ". . . the defense (of res judicata) cannot ordinarily be raised by Motion or Demurrer since these are not appropriate methods of presenting to the Court the **facts** with respect to the adjudication . . . .". **2 Freeman on Judgments** (5th ed.), Sec. 798, p. 1691.

(2) The lower Court's judgment, further, is violative of the common law rule that there must be an identity of the **facts** in the alleged collateral estoppel

case with the **facts** in the case at bar. **Restatement of Judgments,** Sec. 68.

The record of the alleged collateral estoppel case was not introduced, nor is there anything in the face of the record of this case that shows the identity of the facts of the former case with the facts of the case at bar.

> "According to Coke, an estoppel must 'be certain to every intent', and if upon the face of the record any thing is left to conjecture . . . there is no estoppel . . . .'. **Russell v. Place,** 94 U. S. 606 at 610.

Moreover, there must be proof that the facts of the former case that are alleged to be identical with the facts of the case at bar have been "litigated and determined." **Restatement of Judgments,** supra.

There is nothing of this in the record.

Going beyond the record in the case at bar aliunde to the Opinion in the **Hyden v. Baker and Bennett v. Elliott cases.**. (These are two different cases reported in the same Opinion under the same "286 F. Supp. 475" citation), the **Hyden and Bennett** Court is explicit in showing that the facts in the **Hyden** case are totally different from the facts in the case at bar.

The Court, distinguishing **Hyden v. Baker** from

Bennett v. Elliott, states: "In **Hyden v. Baker,** the dilution (of the right to vote) arises from the policy . . . that incorporated towns are entitled to at least one Justice of the Peace regardless of population." (parenthesis supplied), **Hyden v. Baker and Bennett v. Elliott,** 286 F. Supp. 475 at 484 (1968).[3]

The Court, continuing, states: "In **Bennett v. Elliott** . . the crux of the dilution (of the right to vote) is . . . equal representation for civil districts which are unequally populated." **Ibid.** See also, **Bennett v. Elliott,** 294 F. Supp. 808 (1968).

It is respectfully submitted that the U. S. District Court may have confused the **Hyden** issue of fact with the **Bennett** issue of fact. The **Bennett,** and **not** the **Hyden,** case involved "unequally populated district" discrimination which, along with "race" and "geographic place" discrimination are the issues in the case at bar. Both cases—as does this case—involved the County Quarterly Court, but the **Bennett** case arose out of Washington County while the **Hyden** case arose out of Shelby County, Tennessee.

Since there is no evidence in the face of the record that the issues of fact that were actually litigated and

[3]Judge Harry Phillips, dissenting in **Hyden and Bennett,** makes it explicit that **race**—the central issue of the case at bar—was not involved in **Hyden v. Baker,** stating, "This is **not** a case in which Tennessee has manipulated . . . political subdivisions so as to deny a person his vote because of race." **Hyden v. Baker and Bennett v. Elliott,** 286 F. Supp. 475 at 486.

determined in the Hyden case are equivalent to the issues of fact in the case at bar, and since a comparison of the Opinion in the Hyden case and the Complaint in the instant case does not reveal that the issue of fact of incorporated towns and Justices of the Peace in the former case is an issue of fact in the case at bar, and since a comparison aliunde of the record of the former and the latter cases reveals no equivalent issue of fact, there cannot be, as Defendant urges, estoppel.

> "The judgment could . . . not be an estoppel . . . of this action, based upon facts of a totally different nature . . . .". **Memphis City Bank v. Tennessee,** 161 U. S. 186 at 193. See, **in accord, Lawlor v. National Screen Service, 349** U. S. 322 at 328, **Third National Bank v. Stone,** 174 U. S. 432 at 434, and **Commissioner v. Sunnen,** 333 U. S. 591 at 599-600. See also, in accord, **2 Freeman on Judgments** (5th ed.), Sec. 712, pp. 1501-1504, and **2 Black on Judgments** (2nd ed.), Sec. 609, p. 925.

Defendant Shelby County makes no defense except 'res judicata as a collateral estoppel' to Plaintiffs' allegations; **viz.** Defendant Shelby County does not deny the Plaintiffs' "unequally populated districts," "geographic place," or "race" discrimination allegations. (**Defendant Shelby County's Brief to U. S. Court of Appeals,** generally).

In sum, the common law doctrine of res judicata is not to be used to defeat the constitutional law of an equal right to vote. It is a shield, not a sword. C. J. S., **Judgments,** Sec. 592, n. 9.

c. The Plaintiffs and the Defendant City of Memphis

The Defendant City states that ". . . in accord **with Section 3 of the Charter of the City of Memphis, these zone lines would be redrawn in light of the 1970 Federal Census** so that changes in population which would have taken place since the initial drawing of these zones **would be** taken into account and so that the zones **would be** as equal in population as possible." (emphasis supplied) **City, p. 6.**

The lower Court, granting the Defendant City of Memphis' Motion to Dismiss, stated,

"With respect to the City Council of the City of Memphis, by virtue of Section 3 of the Charter of the City, the boundaries of the districts from which members of the council are elected (to the extent that council members are elected by districts) must be redrawn in the light of the 1970 decennial federal census to be effective for the 1971 elections. Accordingly, in this respect plaintiff is attacking an apportionment that will no longer be operative with the next election in 1971. Further, we do not believe that plaintiff's contention that it is unconstitutional

to elect other council members from the city at large has any merit. Accordingly, the claim for reapportionment of the city council should be dismissed." **Order,** 14 July 1970.

The lower Court, it is respectfully submitted, erred, for the following reasons:

The United States Supreme Court had spoken to the Defendant City of Memphis in 1963, saying:

"... we cannot ignore the passage of a substantial period of time since the original declaration of the manifest unconstitutionality of racial practices such as are here challenged, the repeated and numerous decisions giving notice of such illegality ("It is noteworthy that in none of these cases was the possibility of delay in effecting desegregation even considered." Note 2 at p. 530) and the many intervening opportunities heretofore available to attain the equality of treatment which the Fourteenth Amendment commands the States to achieve," at Amendment commands the States to achieve." **Watson v. Memphis,** 373 U. S. 526 at 528 (1963).

"The City (of Memphis, Tennessee) has effected, continues to effect, and claims the right or need to prolong patently unconstitutional racial discriminations violative of now long declared and well established individual rights," **Ibid,** at p. 533.

". . . goodwill between the races in Memphis . . . can best be . . . extended by the observance and protection, not the denial, of the basic constitutional rights here asserted. The best guarantee of civil peace is adherence to, and respect for, the law." **Ibid,** at p. 537.

". . . constitutional rights are to be promptly vindicated. . . . affirmative judicial action was required . . . the solution to the problems growing out of race relations cannot be prompted by depriving citizens of their constitutional rights and privileges." **Ibid,** at p. 539.

"The rights here asserted are, like all rights, present rights; they are not merely hopes to some future enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the **here and now** and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled." (emphasis supplied) **Ibid,** at p. 533.

The Defendant City of Memphis was ordered, in short, to 'set your house in order'.

The Defendant City, in its 1971 statement, supra, that it **futuristically** "would" make its district zones "as equal in population as possible," does not state that **twice** since the U. S. Supreme Court spoke in **Watson v. Memphis,** supra, and since the equality

doctrine was enunciated in **Reynolds v. Sims,** supra, the Defendant City of Memphis—vis a vis its own Charter provision requiring that its district zones be "**at all times** as equal in population as practicable," (emphasis supplied) **City of Memphis Charter, Ordinance No. 1852,** Sec. 2—disregarded **both** the U. S. Supreme Court and its own Charter; **viz.** the City of Memphis, after the above decisions, **disregarded the 1960** census in its **1966** reapportionment and, subsequently, after the passage of its Charter, supra, disregarded the **1967** Special Federal Census[4] in its **1969** reapportionment. See Exhibits XII and XIII.

d. The Plaintiffs and the Defendant City of Memphis Board of Education

The Defendant City of Memphis Board of Education states:

"**. . . there is no basis at law on which to complain of the use of the at-large representation.** On the contrary, the Courts have specifically sanctioned the use of multi-member or at-large districts with regard to state legislative bodies:

> ". . . Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating **multi-mem-**

[4]**Special Census of the City of Memphis, Tennessee, March 27, 1967, Bureau of the Census, U. S. Department of Commerce.**

ber or floterial **districts.' Reynolds v. Sims, supra,** 12 L. Ed. 2d at 537."

The lower Court, granting the Defendant City of Memphis Board of Education's Motion to Dismiss, stated,

"The members of the City Board of Education, who are elected by the people, are elected by districts and by virtue of Chapter 340 of the Private Acts of 1970, such districts will be restructured just as and to be congruent with the city council districts in the light of the 1970 census. Accordingly, again, plaintiffs are attacking an apportionment that will no longer be operative with the next election in 1971. The claim for reapportionment of the Board of Education should therefore be dismissed." **Order,** 14 July 1970.

The lower Court, it is respectfully submitted, erred in granting the Defendant City of Memphis' Motion to Dismiss for the following reasons:

(1) The U. S. District Court did not understand the facts of the case at bar as is evinced by its statement, supra, that "The members of the City Board of Education . . . are elected by districts . . . .". The System of Apportionment of the City of Memphis Board of Education is an "At-Large" System of Apportionment. **Complaint,** p. 17, note 1.

(2) The U. S. District Court, because of its error

of fact, supra, erred in law because it applied the law of district systems of apportionment to an at-large system of apportionment.

Moreover, it is respectfully submitted, that the Defendant City of Memphis Board of Education's statement that ". . . there is no basis at law on which to complain of the use of at-large representation," supra, is subject to the condition of an environment without a policy of discrimination against human beings simply because of the color of their skin.

> "If these . . . multi-representative districts cannot be explained on a geometric, geographic, or equalization basis, and we find they cannot, why did the legislature adopt them? We think but one answer is consistent with all the facts and circumstances." **Sims v. Baggett,** 247 F. Supp. 96 at 107-8 (1965).

> "The plan adopted . . . can have no other effect (than that) of preventing the election of Negroes . . . ."), **Ibid,** at 109.

> "The principles rationally extrapolated from the voting rights cases derive content from the concrete situations that gave rise to them. What the Constitution forbids is 'discrimination', sophisticated as well as simple-minded . . . .," **Ibid.**

Is this the environment of Memphis and Shelby County, Tennessee?

The answer?

There has never been throughout history a black man or a black woman elected to the at-large City of Memphis Board of Education vis a vis 51.8 percent of all the children in the City of Memphis School System in the school year 1970-1971 being black children, supra.

Might this be one answer to the question of 'why' there are so many school cases in our courts?

G. THE CONCLUSION

1. Plaintiffs-Petitioners Prayed of The Lower Courts

a. A declaration by judgment of the constitutional right of the Plaintiffs;

b. An order to Defendants to change immediately their current system of distribution of legislators and school board representatives to a constitutional system—said constitutional system to be a distribution of legislators and school board representatives based on actual population, place, and race as set forth, **supra**—and to file said system with this Court, with right reserved to Plaintiffs to this suit to file objections to said

system within thirty days after Defendants' filing thereof or to waiver objections thereto, for this Court's approval or disapproval of said system with respect to its meeting the constitutional mandates, **supra**;

c. An order for an immediate election of legislators and school board representatives based on the constitutional system, **supra**, and their taking office immediately upon the certification of the vote in said election. Persons elected to hold office until 31 December 1974 for City offices and until 1 September 1972 for County offices, or until their successors are elected and qualified.

2. Plaintiffs-Petitioners Pray of the United States Supreme Court

A grant of the Writ of Certiorari to review the Final Order of the United States Court of Appeals adopting the Order of the United States District Court.

RESPECTFULLY SUBMITTED,

W. SLATER HOLLIS
COUNSELLOR FOR PLAINTIFFS-PETITIONERS
P. O. BOX 80876
MEMPHIS, TENNESSEE 38111

CERTIFICATE OF SERVICE

We hereby certify that we have this day mailed two copies of this Brief to the Attorneys for all parties to the proceedings; namely, Mr. James Manire, City Attorney, and Mr. Brady Bartusch, City Staff Attorney, City Hall; Mr. Cleve Drennon, County Attorney, Shelby County Bldg.; Mr. Jack Petree, City Board of Education Attorney, and Ernest Kelly, Jr., Of Counsel, 900 Memphis Bank Bldg.; Mr. Lee Winchester, Jr., Co. Bd. of Educ. Attorney, Suite 3200, 100 N. Main Bldg., all of Memphis, Tennessee, and Mr. David Pack, State Attorney General, Supreme Court Bldg., Nashville, Tenn., this 25th 30 day of June, 1971.

W. Slater Hollis

W. Slater Hollis

APPENDIX NO. I

No. 20,736

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

POP POPPENHEIMER, et al,
PLAINTIFFS-APPELLANTS,

v.

STATE OF TENNESSEE, et al,
DEFENDANTS-APPELLEES.

PER CURIAM ORDER

Before: EDWARDS, CELEBREZZE and BROOKS
Circuit Judges

The plaintiffs-appellants brought this action seeking reapportionment of the City Council of the City of Memphis, Tennessee, the Board of Education of the City of Memphis, the Quarterly Court of Shelby County, Tennessee, and the Board of Education of Shelby County, and for other related relief. The plaintiffs then filed a motion for summary judgment, and motions to dismiss the complaint for failure to state a cause of action were filed by the defendants. This appeal is from the order granting the motions to dismiss plaintiffs' complaint.

We have considered the briefs of the parties, their oral arguments and the entire record of this case and conclude, for the reasons stated in the memorandum

of Judge Bailey Brown, that the dismissal of the complaint was proper and should be affirmed.

It is so ORDERED.

Entered by order of the Court

CARL W. REUSS, Clerk

APPENDIX NO. II

POP POPPENHEIMER, et al,

Plaintiffs

v.

THE STATE OF TENNESSEE, et al,

Defendants

ORDER GRANTING MOTIONS TO DISMISS

This is an action in which plaintiffs seek reapportionment of the City Council of the City of Memphis, the Board of Education of the City of Memphis, the Quarterly Court of Shelby County and the Board of Education of Shelby County and other relief.

Although a three-judge court was demanded, we have heretofore determined that such is not authorized and denied the application for such in a memorandum decision and order entered May 6, 1970.

Motions to dismiss have been filed in behalf of all the aforesaid bodies sought to be reapportioned. Since affidavits have also been filed, to the extent appropriate we treat such motions as being in effect motions for summary judgment. Rule 12(b), F.R.C.P.

With respect to the claim for reapportionment of the Shelby County Quarterly Court, we are of the opinion that such must be dismissed for the reason that this question is now res judicata by virtue of the decision in **Hyden v. Baker,** 286 F. Supp. 475 (M.D. Tenn. 1968). In that class action, the Court held that the Quarterly Court had been unconstitutionally apportioned and later approved the very plan of apportionment which is now in effect and which is being attacked by plaintiffs. Under the court order approving the apportionment, the members elected under such a plan of apportionment are to hold office until September 1, 1972.

With respect to the Shelby County Board of Education, which is presently selected by the Quarterly Court, the claim is that Chapter 171 of the Private Acts of 1967, under which the Board members will be selected by the people beginning with the general election to be held in August, 1970, provides for an unconstitutional apportionment. However, in a suit brought by the present Board members, the Chancery Court of Shelby County, by decision entered July 14, 1970, has declared such Private Act un-

constitutional so that the Board will not be elected pursuant to the Private Act herein attacked. Accordingly, the claim for reapportionment of the Board should be dismissed.

With respect to the City Council of the City of Memphis, by virtue of Section 3 of the Charter of the City, the boundaries of the districts from which members of the council are elected (to the extent that council members are elected by districts) must be redrawn in the light of the 1970 decennial federal census to be effective for the 1971 elections. Accordingly, in this respect plaintiff is attacking an apportionment that will no longer be operative with the next election in 1971. Further, we do not believe that plaintiff's contention that it is unconstitutional to elect other council members from the city at large has any merit. Accordingly, the claim for reapportionment of the city council should be dismissed.

The members of the City Board of Education, who are elected by the people, are elected by districts and by virtue of Chapter 340 of the Private Acts of 1970, such districts will be restructured just as and to be congruent with the city council districts in the light of the 1970 census. Accordingly, again, plaintiffs are attacking an apportionment that will no longer be operative with the next election in 1971. The claim for reapportionment of the Board of Education should therefore be dismissed.

It is the further view of the Court that the other contentions of plaintiffs (e. g. that the length of the ballot together with the limit on the time allowed to vote are unconstitutional) are without merit.

It is therefore ORDERED that the complaint be dismissed.

ENTER this 14th day of July, 1970.

BAILEY BROWN
CHIEF JUDGE

EXHIBIT I

THE CONCEPTUAL GEOMETRY
OF BLACK MINORITY VOTE ABRIDGEMENT

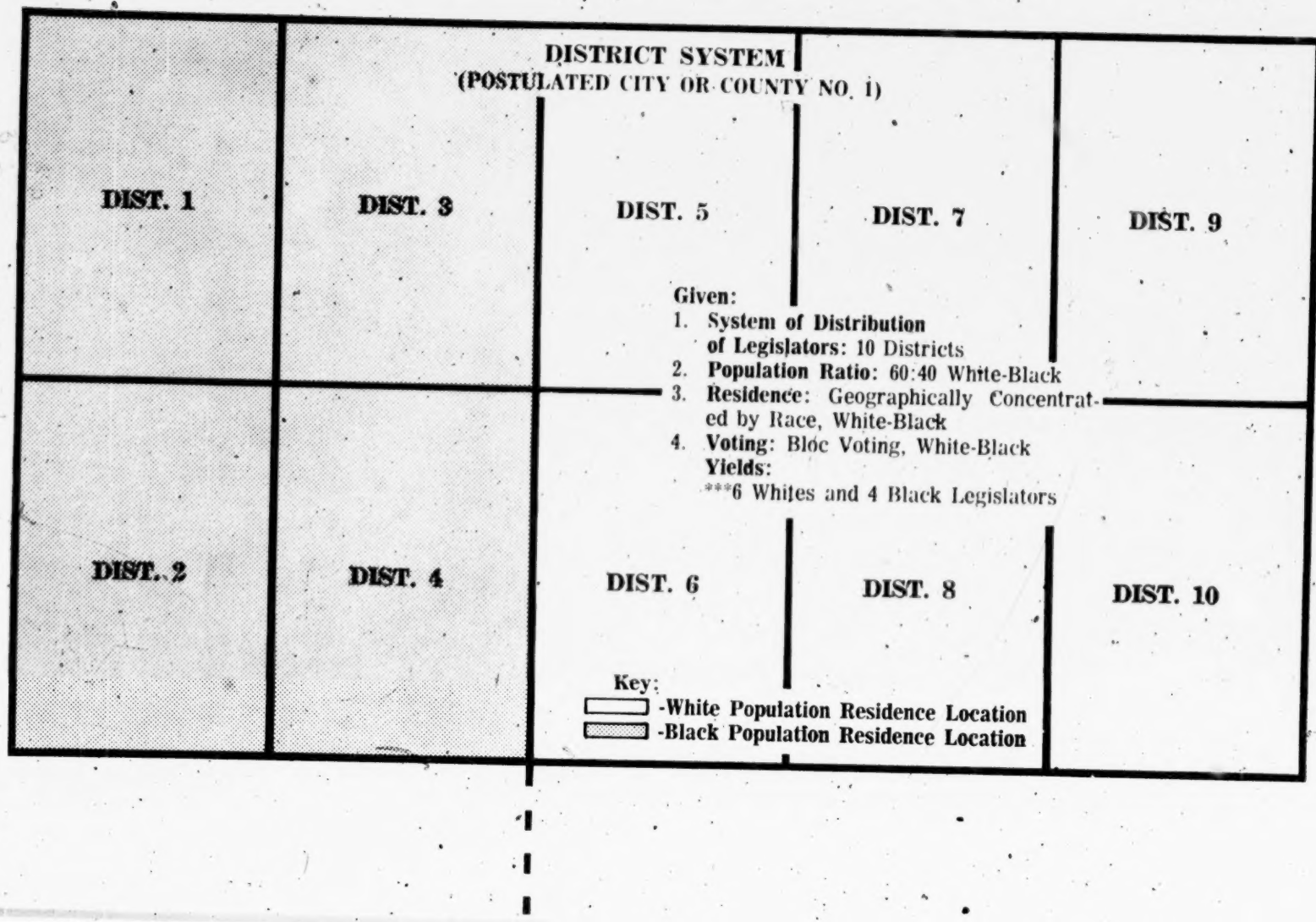


EXHIBIT II

THE CONCEPTUAL GEOMETRY OF BLACK MINORITY VOTE ABRIDGEMENT

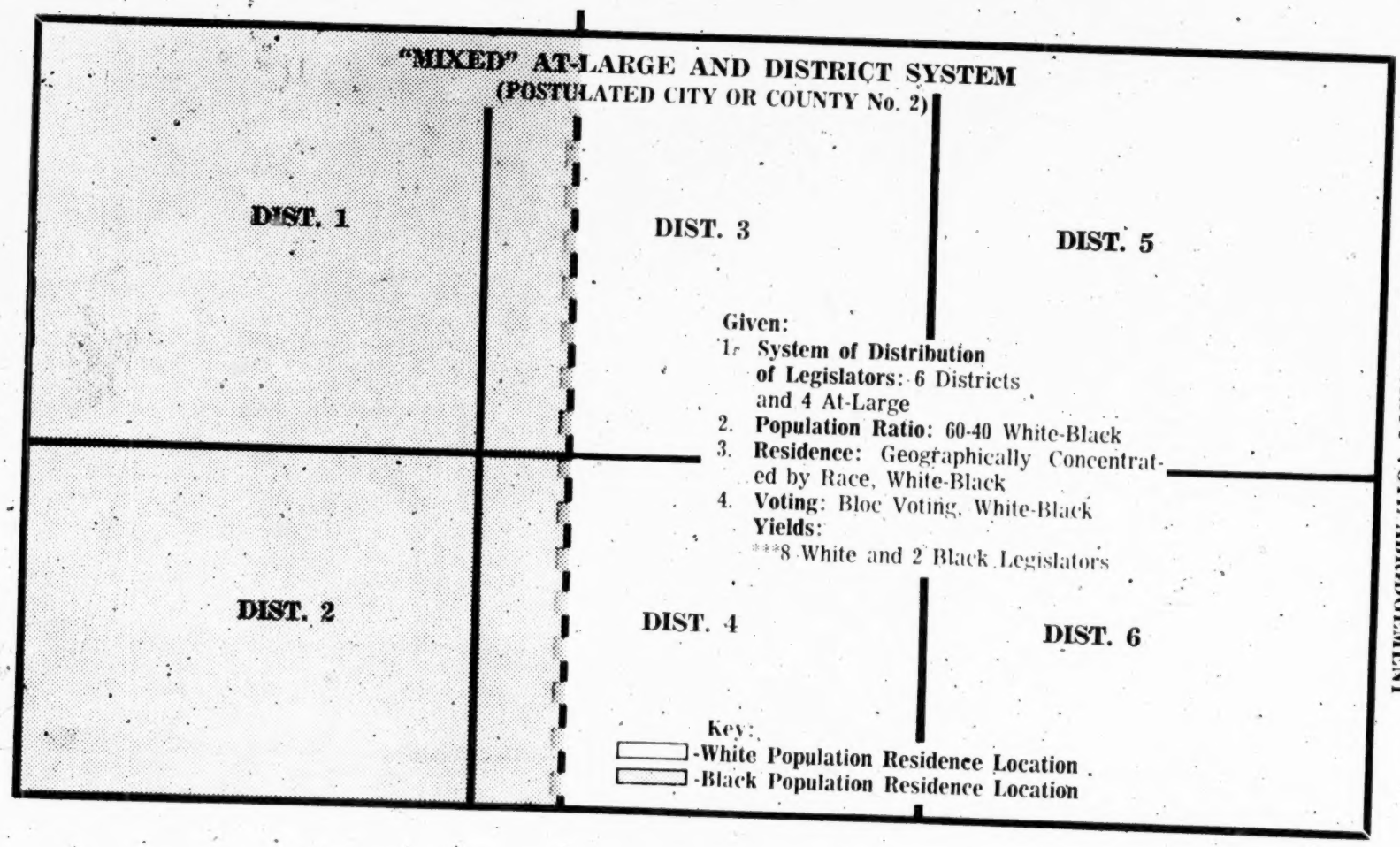


EXHIBIT III

THE CONCEPTUAL GEOMETRY OF BLACK MINORITY VOTE ABRIDGEMENT

AT LARGE SYSTEM
(POSTULATED CITY OR COUNTY NO. 3)

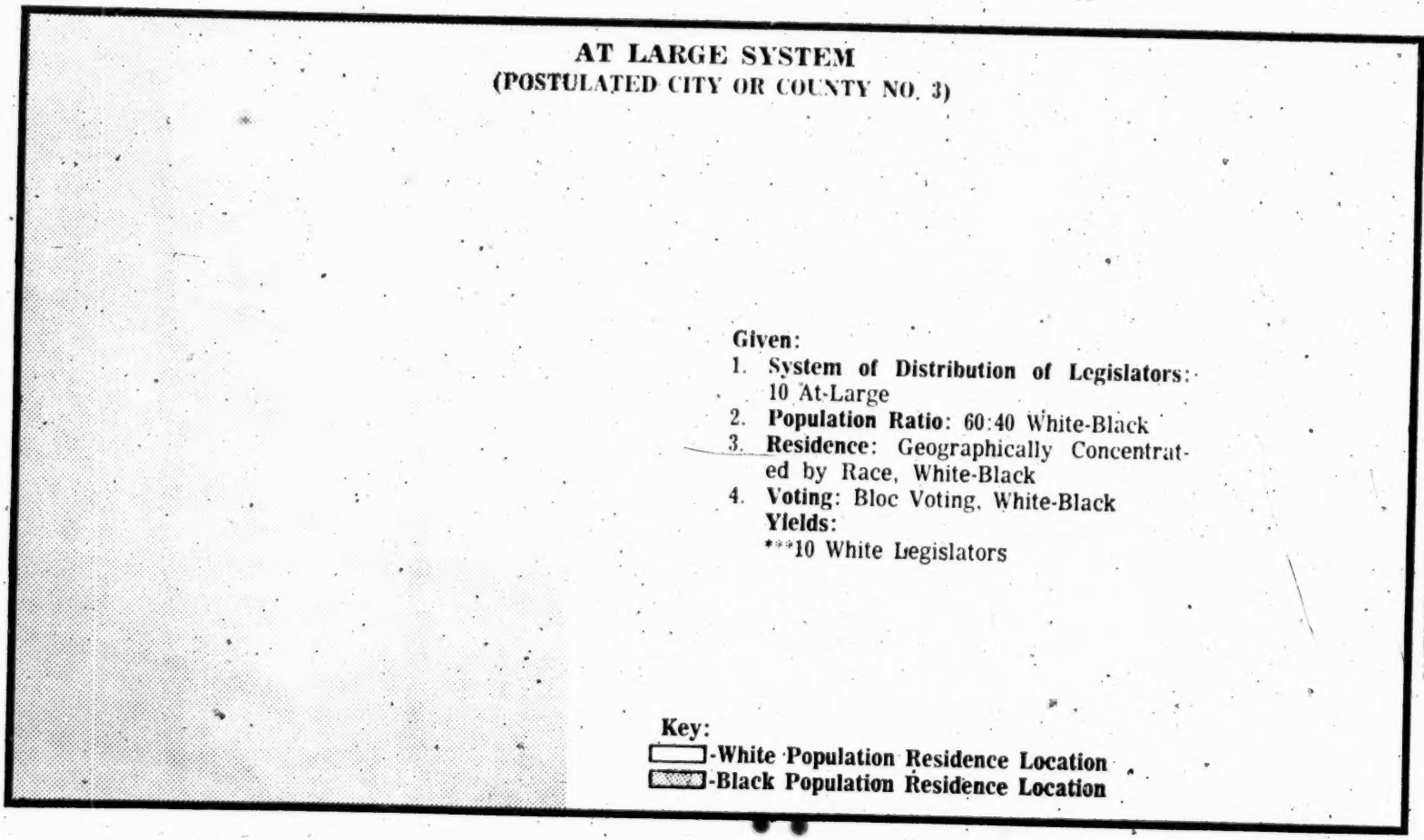


EXHIBIT IV

THE GEOMETRY OF BLACK MINORITY VOTE ABRIDGEMENT

THE SHELBY COUNTY (TENN.) QUARTERLY COURT (11 Members)

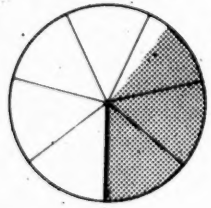
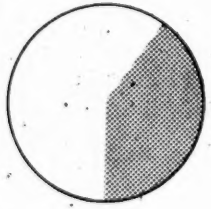
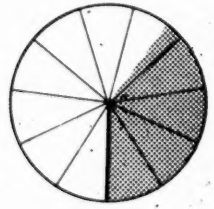
Given:	Given Current System of Apportionment of Legislators (7 Districts, 4 At-Large)	Given Possible System of Apportionment of Legislators (11 Districts)
1. **Population Ratio:** 61:39, White:Black 2. **Residence:** Geographic Concentration by Race, White:Black 3. **Voting:** Bloc Voting, White:Black **Key:** □—White Population Residence Location ▨—Black Population Residence Location	 **7 Districts:** **6 White and** ***1 Black Legislators** *Results from **Registered Voter Apportionment** +  **4 At-Large:** **4 White, and Zero Black Legislators** **Yielded:** **10 White, 1 Black Legislators**	 (Assuming "Equally Populated Districts) **Yields:** **6-7 White, 5-4 Black Legislators**

EXHIBIT V

THE GEOMETRY OF BLACK MINORITY VOTE ABRIDGEMENT

THE MEMPHIS (TENN.) CITY COUNCIL (13 Members)

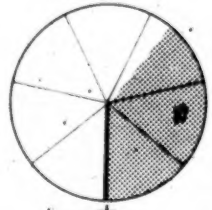
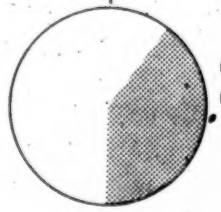
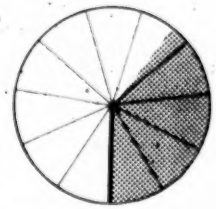
Given:	Given Current System of Apportionment of Legislators (7 Districts, 6 At-Large)	Given Possible System of Apportionment of Legislators (13 Districts
1. **Population Ratio:** 60-40, White:Black 2. **Residence:** Geographic Concentration by Race, White:Black 3. **Voting:** Bloc Voting, White:Black **Key:** □—White Population Residence Location ▩—Black Population Residence Location	 **7 Districts: 4 White, 3 Black Legislators** +  **6 At-Large: 6 White, Zero Black Legislators** **Yielded: 10 White, 3 Black Legislators**	 (Assuming "Equally Populated Districts") **Yields: 9-8 White, 4-5 Black Legislators**

EXHIBIT VI

THE GEOMETRY OF BLACK MINORITY VOTE ABRIDGEMENT

THE MEMPHIS (TENN.) BOARD OF EDUCATION (5 Members)

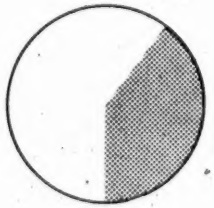
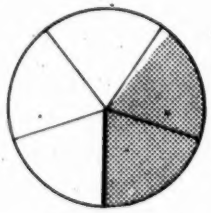
Given:	Given Current System of Apportionment of Legislators (5 At-Large)	Given Possible System of Apportionment of Legislators (5 Districts)
1. **Population Ratio:** 60:40, White:Black 2. **Residence:** Geographic Concentration by Race, White:Black 3. **Voting:** Bloc Voting, White:Black **Key:** □—White Population Residence Location ▨—Black Population Residence Location	 **Yielded:** **5 White, Zero Black Members**	 (Assuming "Equally Populated Districts") **Yields:** **3 White, 2 Black Members**

EXHIBIT VII

THE MATHEMATICS OF BLACK MINORITY VOTE ABRIDGEMENT

THE 1968 COUNTY COURT APPORTIONMENT AND ELECTION IN TERMS OF 1967 U. S. SPECIAL CENSUS AND COUNTY PLANNING COMMISSION FIGURE

Formula	Math Expression	Empirical White/Black Data	Math White-Black Ratio	Actual White/Black Ratio	Ideal White/Black Ratio
Population	$\frac{P_W}{P_B}$	$\frac{431,917}{271,847}$	1.59:1	61:39	61:39
Potential Electorial Voting Power	$\frac{RV_W}{RV_B}$	$\frac{194,680}{91,809}$	2.12:1	68:32	61:39
Actual Electorial Voting Power	$\frac{\text{Avg. } AV_{W(99)}}{\text{Avg. } AV_{B(99)}}$	$\frac{*\ 934.67}{270.36}$	3.46:1	78:22	61:39
Actual Legislative Voting Power Of Representatives	$\frac{R_W}{R_B}$	$\frac{10}{1}$	10:1	91:9	61:39

*At-large Position No. 8 was selected at random in the computation of these figures.

KEY: Where P equals Total Population, RV equals Total Registered Voters, AV equals Actual Voters, R equals Number of Representatives, the Subscript W equals White and B equals Black, W(99) equals all election precincts over 99.8% white population and B(99) equals all election precincts of over 99.8% black population.

EXHIBIT VIII

THE MATHEMATICS OF BLACK MINORITY VOTE ABRIDGEMENT

THE 1967 CITY COUNCIL ELECTION IN TERMS OF PRIOR 1967 U. S. SPECIAL CENSUS

Formula	Math Expression	Empirical White/Black Data	Math White/Black Ratio	Actual White/Black Ratio	Ideal White/Black Ratio
Population	$\frac{P_W}{P_B}$	$\frac{323,448}{213,037}$	1.5:1	60:40	60:40
Potential Electorial Voting Power	$\frac{RV_W}{RV_B}$	$\frac{155,270}{80,033}$	1.9:1	66:34	60:40
Actual Electorial Voting Power	$\frac{\text{Avg. } AV_{W(99)}}{\text{Avg. } AV_{B(99)}}$	$\frac{995.47}{433.29}$	23:1	67:33	60:40
Actual Legislative Voting Power Of Representative	$\frac{R_W}{R_B}$	$\frac{10}{3}$	3.33:1	77:23	60:40

*At-Large Position No. 4 was selected by random draw in the computation of these figures.

KEY: Where P equals Total Population, RV equals Total Registered Voters, AV equals Actual Voters, R equals Number of Representatives, the Subscript W equals White and B equals Black, W(99) equals all election precincts over 99.8% white population and B(99) equals all election precincts of over 99.8% black population.

EXHIBIT IX

THE MATHEMATICS OF BLACK MINORITY VOTE ABRIDGEMENT

THE 1967 BOARD OF EDUCATION ELECTION IN TERMS OF PRIOR 1967 U. S. SPECIAL CENSUS

Formula	Math Expression	Empirical White Black Data	Math White Black Ratio	Actual White Black Ratio	Ideal White Black Ratio
Population	$\frac{P_W}{P_B}$	$\frac{323,448}{213,037}$	1.5:1	60:40	60:40
Potential Electorial Voting Power	$\frac{RV_W}{RV_B}$	$\frac{155,270}{80,033}$	1.9:1	66:34	60:40
Actual Electorial Voting Power	$\frac{\text{Avg. } AV_{W(99)}}{\text{Avg. } AV_{B(99)}}$	$\frac{*825.67}{94.64}$	8.7:1	90:10	60:40
Actual Legislative Voting Power Of Representative	$\frac{R_W}{R_B}$	$\frac{5}{0}$	∞		60:40

*At-Large Position No. 4 was selected by random draw in the computation of these figures.

KEY: Where P equals Total Population, RV equals Total Registered Voters, AV equals Actual Voters, R equals Number of Representatives, the Subscript W equals White and B equals Black, W(99) equals all election precincts over 99.8% white population and B(99) equals all election precincts of over 99.8% black population.

EXHIBIT X

ACTUAL POPULATION AND REGISTERED VOTERS BY DISTRICTS

THE 1968 COUNTY COURT APPORTIONMENT AND ELECTION IN TERMS OF 1967 U. S. SPECIAL CENSUS AND COUNTY PLANNING COMMISSION FIGURES

(1) District	(2) White Population	(3) Negro Population	(4) Total Population	(5) Ideal: Total (Col. 4) / Total Districts	(6) Difference In People (Col. 4-Col. 5	(7) Variance (Col. 6/Col.5)	(8) Representatives Residing In District
POPULATION							
1	100,313	32,407	132,720	100,537.7	32,182.3	32.01%	1
2	46,601	55,108	101,709	100,537.7	1,171.3	1.16%	2
3	76,547	14,684	91,231	100,537.7	— 9,306.7	—9.25%	2
4	82,097	2,208	84,305	100,537.7	—16,232.7	—16.14%	2
5	58,927	42,246	101,173	100,537.7	635.3	0.63%	1
6	8,348	98,531	106,879	100,537.7	6,341.3	6.30%	1
7	59,084	26,663	85,747	100,537.7	—14,773.7	—14.69%	2
Grand Total	431,917	271,847	703,764		80,643.3	80.18%	11
Average Grand Total	61,702.4	38,835.3	100,537.7				
REGISTERED VOTERS							
1	33,173	5,833	39,006	40,927	1,921	4.69%	1
2	20,105	20,021	40,126	40,927	801	1.95%	2
3	37,480	5,642	43,122	40,927	2,195	5.36%	2
4	41,924	594	42,518	40,927	1,591	3.88%	2
5	26,216	12,282	38,498	40,927	2,429	5.93%	1
6	4,367	36,667	41,034	40,927	107	0.26%	1
7	31,415	10,770	42,185	40,927	1,258	3.07%	2
Grand Total	194,680	91,809	286,489		10,302	25.14%	11
Average Grand Total	27,811.4	13,115.6	40,927				

EXHIBIT XI

ACTUAL POPULATION AND REGISTERED VOTERS BY DISTRICTS

THE 1967 CITY COUNCIL AND THE CITY BOARD OF EDUCATION ELECTIONS IN TERMS OF PRIOR 1967 U. S. SPECIAL CENSUS

(1) District	(2) White Population	(3) Negro Population	(4) Total Population	(5) Ideal Total (Col. 4) / Total Districts	(6) Difference In People Col. 4-Col. 5	(7) Variance (Col. 6/Col.5)	(8) Representatives Residing In (City Council) District	(9) Representatives Residing In (City Council) District
POPULATION								
1	50,201	34,847	85,048	76,655	+ 8,393	+10.94%	1	0
2	68,177	677	68,854	76,655	— 7,801	—10.17%	4	2
3	78,868	1,420	80,388	76,655	+ 3,733	+ 4.86%	1	1
4	37,314	39,056	76,370	76,655	— 285	— 0.37%	1	0
5	54,318	11,366	65,684	76,655	—10,971	—14.31%	4	2
6	7,171	78,728	85,899	76,655	+ 9,244	+ 12.05%	1	0
7	27,399	46,943	74,342	76,655	— 2,313	— 3.01%	1	0
Grand Total	323,448	213,037	536,585		42,735	55.71%	13	5
Average Grand Total	46,206.8	30,433.8	76,655					
REGISTERED VOTERS								
1	20,485	12,576	33,061	33,614.7	553.7	1.64%	1	0
2	34,563	268	34,831	33,614.7	1,216.3	3.61%	4	2
3	36,127	406	36,533	33,614.7	2,938.3	8.74%	1	1
4	18,189	16,309	34,498	33,614.7	883.3	2.62%	1	0
5	30,143	4,057	34,200	33,614.7	585.3	1.74%	4	2
6	3,941	29,265	33,206	33,614.7	408.7	1.21%	1	0
7	11,822	17,152	28,974	33,614.7	4,640.7	13.80%	1	0
Grand Total	155,270	80,033	235,303		11,226.3	33.36%	13	5
Average Grand Total	22,181.47	11,433.2	33,614.7					

EXHIBIT XII

ACTUAL POPULATION AND REGISTERED VOTERS BY DISTRICTS THE CITY COUNCIL AND CITY SCHOOL BOARD

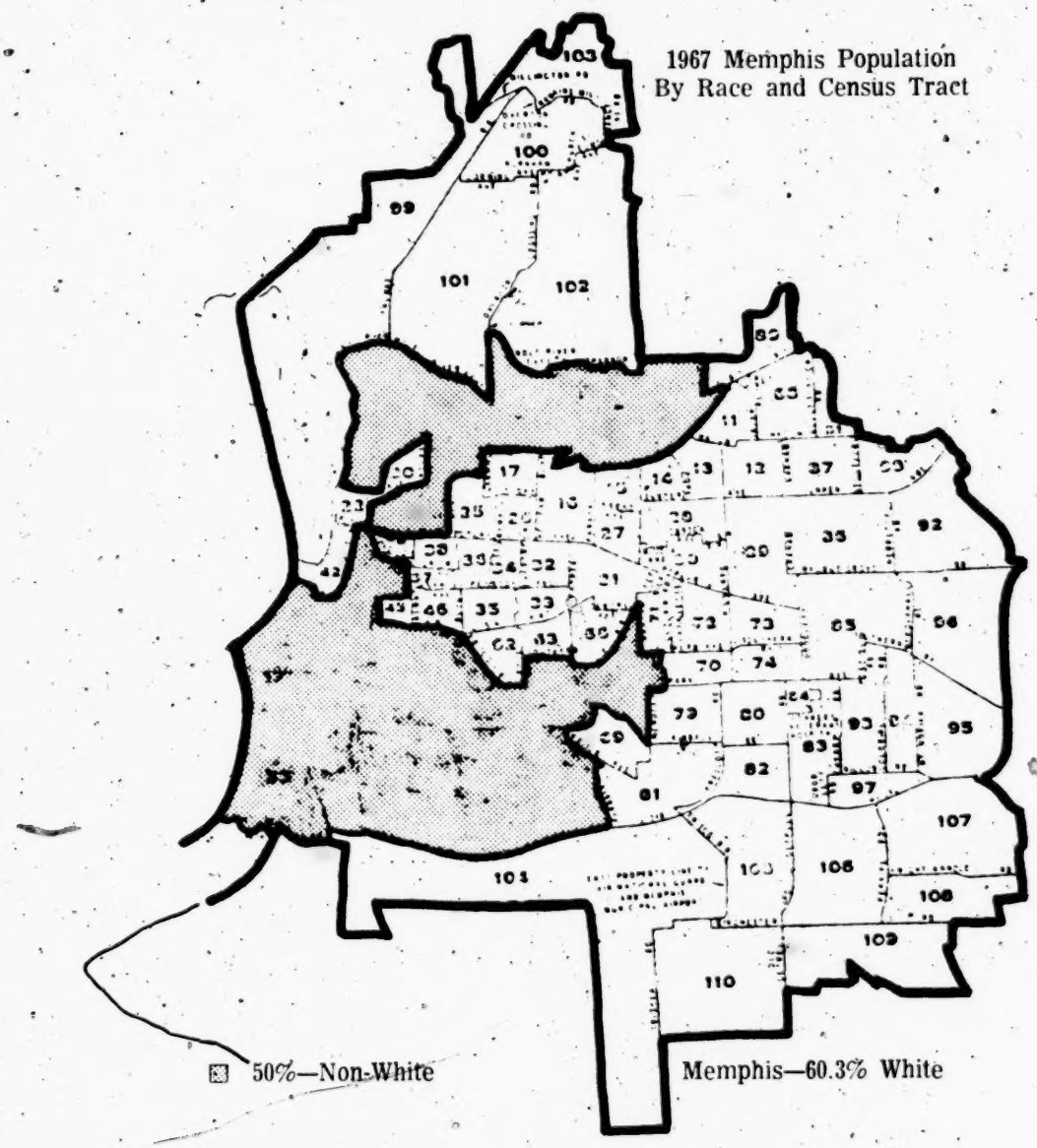
(1) District	(2) White Population	(3) Negro Population	(4) Total Population	(5) Ideal Total (Col. 4) / Total Districts	(6) Difference In People Col. 4-Col. 5	(7) Variance (Col. 6/Col.5)	(8) Representatives Residing In (City Council) District	(9) School Board Representatives Residing In (City Council) District
1966 CITY COUNCIL AND SCHOOL BOARD APPORTIONMENT IN TERMS OF 1960 U. S. CENSUS								
1			71,200	71,117	+ 83	+ 0.1%	1	0
2			64,741	71,117	— 6,376	— 8.9%	4	2
3			53,009	71,117	—18,108	—25.5%	1	1
4			68,039	71,117	— 3,078	— 4.2%	1	0
5			67,101	71,117	— 4,016	— 5.6%	4	2
6			83,875	71,117	+12,758	+17.9%	1	0
7			89,854	71,117	+18,735	+26.3%	1	0
Grand Total			497,819	—	63,056	88.5%	13	5
Average Grand Total			71,117	—				
1969 CITY COUNCIL AND SCHOOL BOARD APPORTIONMENT IN TERMS OF 1967 U. S. SPECIAL CENSUS								
1			87,998	85,880	+ 2,118	+ 2.46%	1	0
2			74,363	85,880	—11,517	—13.42%	4	2
3			80,591	85,880	— 5,289	— 6.16%	1	1
4			84,817	85,880	— 1,063	— 1.24%	1	0
5			78,613	85,880	— 7,267	— 8.47%	4	2
6			93,630	85,880	+ 7,750	+ 9.02%	1	0
7			101,146	85,880	+15,266	+17.77%	1	0
Grand Total			601,158	—	50,270	58.54%	13	5
Average Grand Total			85,879.7	—				

EXHIBIT XIII

THE COMPARISON OF THE 1966 AND THE 1969 APPORTIONMENTS OF THE CITY COUNCIL OF MEMPHIS, TENNESSEE		
MATHEMATICAL FORMULA	**MATHEMATICAL VARIANCE**	
	1966 Apportionment In Terms Of 1960 U. S. Census	**1969 Apportionment In Terms Of 1967 U. S. Special Census**
Percentage Variance of Largest Population District And the Average or Ideal Population District	26.3%	17.8%
Percentage Variance of Smallest Population District And the Average or Ideal Population District	25.5%	13.4%
Absolute Percentage Variance Between the Largest And Smallest Districts in terms of the Average or Ideal Population District	51.8%	31.2%
Absolute Percentage Variance Between the Largest And Smallest Districts Per Se	69.5%	36.0%

EXHIBIT XIV

RESIDENCE: GEOGRAPHIC CONCENTRATION BY RACE



Source: Memphis and Shelby County Health Department

EXHIBIT XV

CHAPTER NO. 50
OF PUBLIC ACTS OF TENNESSEE, 1967
SENATE BILL, NO. 198

(By Pipkin, Stanton)

Substituted for: House Bill No. 248

(By Avery, Weldon, Peeples, Farley, Dunavant, Bridges, Gill, Kidwell, Taylor, Norvell)

AN ACT to amend Section 2-1507 of the Tennessee Code Annotated relative to Ballots used on Voting Machines.

Section 1. **Be it enacted by the General Assembly of the State of Tennessee,** That Section 2-1507 of the Tennessee Code Annotated is hereby amended by inserting after the second (2nd) sentence of said Section, the following:

"However, in no event, shall a number be prefixed before or affixed after name of candidates for any office so as to designate by number the order in which candidates' names are on the ballot for any office."

Section 2. **Be it further enacted,** That this Act shall take effect from and after its passage, the public welfare requiring it.

Passed: April 5, 1967.

FRANK C. GORRELL,
Speaker of the Senate.

EXHIBIT XVI
THE LITERACY EFFECT
OF CHAPTER 50 OF THE PUBLIC ACTS OF TENNESSEE, 1967

MATH FORMULA	CITY COUNCIL (At Large No. 4)	COUNTY COURT (At Large No. 8)	City School Board (At Large No. 4)
(White) Avg. Actual Vote / Avg. Reg. Vote	57.67%	55.9%	45.2%
(Negro) Avg. Actual Vote / Avg. Reg. Vote	30.93%	19.3%	7.10%
(White) Avg. Actual Vote / Avg. Population	27.95%	26.3%	23.10%
(Negro) Avg. Actual Vote / Avg. Population	12.72%	7.94%	2.80%

Note: All figures computed from the 99.8% White and Black precincts of the last election for the randomly selected offices specified above.

IN THE

Supreme Court of The United States

POP POPPENHEIMER ET AL
PLAINTIFF-PETITIONER

VS.

THE STATE OF TENNESSEE, acting through its agents and arms,
THE CITY OF MEMPHIS, TENNESSEE,
THE COUNTY OF SHELBY, TENNESSEE,
ET AL
DEFENDANTS-RESPONDENTS

NO. 71-3

PETITIONERS' BRIEF IN RESPONSE TO RESPONDENTS' BRIEFS

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IN THE

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NO. 71-3

PETITIONERS' BRIEF IN RESPONSE TO RESPONDENTS' BRIEFS

TO THE HONORABLES CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

REPLY TO RESPONDENTS' BRIEFS

THE COUNTY OF SHELBY

Defendant-Respondent Shelby County's argument

was anticipated and met in the **Petition for Writ of Certiorari,** pp. 19-20 and 23-28; particularly the footnotes.

THE CITY OF MEMPHIS

Plaintiffs-Petitioners respectfully bring to the Court's attention that Defendant-Respondent City of Memphis' **Brief** is generally not responsive to the **Petition for Writ of Certiorari;** instead, the City attempts to make non-issues into issues: to wit:

(1) "They (the Petitioners) are attacking a system of **periodic** reapportionment. . . . In that case (Reynolds), it was expressly held that reapportionment of legislative districts following each Federal decennial census compiled with Constitutional requirements . . .". (parenthesis and emphasis supplied) **Respondent City's Brief,** p. 10.

(2) "It would appear that the Complaint . . . is asking the Court to require that the electoral districts of defendants be drawn entirely along racial lines". **Ibid,** at p. 13.

(3) In these portions of the Complaint, the Plaintiffs appear to object to the **number** of electoral districts . . .". (emphasis supplied) **Ibid.**

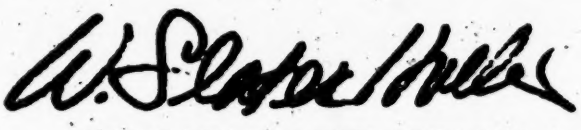
Defendant-Respondent City of Memphis does not, and can not, reference any instance in or outside the record to support these affirmations. They are non-issues that serve only to obfuscate the true issue of the case. **Petition,** pp. 2-3, 15-16.

Defendant-Respondent City of Memphis attempts further to make "apportionment **by population**" the **single** issue of the case, **Respondents' Brief,** p. 7, but it can cite no portion of the Complaint to support its urging. The legal issues (there are no issues of fact. See **Petition,** p. 15) are apportionment of legislators by race, by place, by population, and by literacy. (emphasis supplied) **Petition,** E. 2. **c. at pp. 9-12** and E. 2. **e.** at p. 12. See, **in accord, Complaint,** V., Sections D and E, at pp. 11-17 and Exhibits thereto.

Defendant-Respondent City of Memphis' argument, limited to apportionment by population, supra, that they futuristically "would" comply with this Court's mandates, **Respondent City's Brief,** pp. 8-9, was anticipated and is met in the **Petition for Writ of Certiorari,** pp. 20-21, 28-34.

Defendant-Respondent City of Memphis attacks Petitioners use of the wording "designedly or not" in the Complaint, **Respondent City's Brief,** p. 11. This is essentially the wording of this Court in **Fortson v. Dorsey,** 379 U. S. 433 at p. 439. See also **Burns v. Richardson,** 384 U. S. 73 at p. 88.

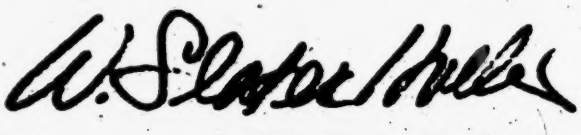
WHEREFORE, Petitioners pray that a Writ of Certiorari issue to review the Opinion and Decree of the Supreme Court of the State of Tennessee in the case at bar.



WILLIAM SLATER HOLLIS

CERTIFICATE OF SERVICE

We hereby certify that we have this day mailed two copies of this Brief to the Attorneys for all parties to the proceedings; namely, Mr. James Manire, City Attorney, and Mr. Brady Bartusch, Assistant City Attorney, City Hall; Mr. Cleve Drennon, County Attorney, Shelby County Bldg.; Mr. Jack Petree, City Board of Education Attorney, and Ernest Kelly, Jr., Of Counsel, 900 Memphis Bank Bldg.; Mr. Lee Winchester, Jr., Co. Bd. of Educ. Attorney, Suite 3200, 100 N. Main Bldg., all of Memphis, Tennessee, and Mr. David Pack, State Attorney General, Supreme Court Bldg., Nashville, Tenn., this 5th day of August, 1971.



W. Slater Hollis

SUPREME COURT, U. S.

71-34

Supreme Court, U.S.
FILED
JUL 21 1971
E. ROBERT SEAVER, CLERK

IN THE

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PLAINTIFFS-PETITIONERS

VS

THE STATE OF TENNESSEE, acting through its agents and arms,
THE CITY OF MEMPHIS, TENNESSEE,
THE COUNTY OF SHELBY, TENNESSEE,
ET AL

DEFENDANTS-RESPONDENTS

RESPONDENTS' CITY OF MEMPHIS AND BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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DEFENDANTS-RESPONDENTS

RESPONDENTS' CITY OF MEMPHIS AND BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

This brief is respectfully filed in behalf of the Defendants, Respondents, City of Memphis, and the Board of Education of the Memphis City Schools in

opposition to the petition for writ of certiorari filed herein.

BASIC ISSUE

The basic issue presented by the Petition is whether the United States Court of Appeals for the Sixth Circuit was correct in affirming the ruling of the District Court that the Complaint of the Plaintiffs-Petitioners fails to state a claim on which relief can be granted. (For Convenience the parties will be referred to in accordance with their status in the trial court, that is Petitioners as "Plaintiffs" and Respondents City of Memphis and Board of Education of the Memphis City Schools as "Defendants".)

II.

STATEMENT OF THE CASE

Defendants cannot accept the statement of facts of plaintiffs.

A. Concise Summary of The Controversy

The instant case involves a suit brought against these defendants, together with the State of Tennessee, the County of Shelby, and the School Board of Shelby County, The Complaint seeks to invali-

date both the electoral districts and the general electoral framework of each of the defendants. The Complaint also attacks two laws regarding the general voting procedures in the State of Tennessee.

The District Court for the Western District of Tennessee granted a motion of these defendants to dismiss the Complaint for failure to state a claim on which relief can be granted, and the Sixth Circuit Court of Appeals affirmed that dismissal for the reasons stated by the District Judge. (Petition for Certiorari Page 37).

B. **The Facts**

Defendant, The City of Memphis, is a municipal corporation existing under the laws of the State of Tennessee. It is operated by a Mayor and Council form of government. The Mayor, together with six members of the Council, is elected from the City at large, while the remaining seven Council members are elected by unitary single-member districts. A Charter amendment adopted on August 6, 1970, provided for the election of a temporary councilman from newly annexed territory so that until the next city election in October of 1971, there are eight districts; after which the City will revert to seven districts. As indicated the next election for City offices is scheduled to be held on October 7, 1971.

Prior to that election, the Council is required, pursuant to Section 3 of the Charter of the City of Memphis, to redraw the boundaries of the seven districts so that the districts reflect any population changes shown in the 1970 census. Section 3 of the Charter of the City of Memphis is as follows:

> **"Re-Districting After Decennial Census.** BE IT FURTHER ORDAINED, that notwithstanding that provisions of the preceding Section of this Ordinance, a review and adjustment of the boundaries of said districts as originally established, or as thereafter changed, shall be completed not less than ninety (90) days prior to the next Municipal Election following the publication of the official decennial federal census and shall be as equal in population as practicable."

The Council acted pursuant to this law as evidenced by an ordinance passed on June 22, 1971, as set forth in the appendix.

The Defendant, Board of Education of the Memphis City Schools, is a separately-chartered governmental agency existing under the Private Acts of the State of Tennessee and charged with the responsibility of operating the public school system of the City of Memphis. The jurisdiction of the Board of

Education is co-extensive with the boundaries of the City of Memphis. The present Board of Education was elected in 1967 and consists of five members elected from the City at large. The terms of the incumbent school commissioners will last until January 1, 1972. Pursuant to Chapter 340, Private Acts of 1970, the next election of school commissioners will be held on the first Thursday following the first Tuesday in October, 1971, to conform with the elections of the City of Memphis. The same Act provides that at this election, two school commissioners will be elected from the City at large and seven school commissioners will be elected by district. The districts will be identical with the electoral districts of the seven district councilmen elected for the City of Memphis. It should be noted that Section 3, Chapter 340, Private Acts of 1970, also provides for the incorporation in the district boundaries of any amendments made by the council of the City of Memphis. Thus, the revision of the district boundaries to reflect the result of the 1970 census will automatically result in a revision of legislative boundaries from which the school commissioners are to be elected.

C. History of Litigation

The instant lawsuit purports to be brought under the Civil Rights Act and constitutes an attack

on the electoral structure of the various defendants. The lawsuit also includes allegations of unconstitutionality directed against Tennessee Code Annotated 2—1507 to the extent that this section prohibits the use of numbers of designate candidates on the ballot, and T.C.A. 2—1502 to the extent that this section sets a two minutes limit on the time which any one voter shall be allowed to occupy a voting machine. On May 6, 1970, following certain amendments to the Complaint, the District Court entered an order denying the plaintiffs' request for a three-judge District Court. An appeal from this order was dismissed by this Court on October 19, 1970 and an order denying a three judge court was entered by the Sixth Circuit on November 3, 1970. Defendants are uncertain from plaintiff's brief whether this denial of a three-judge District Court is regarded by plaintiff's as an issue on appeal. Defendants would point out, however, that this ruling was obviously correct with respect to the issues involving these defendants since it is conceded that the attack on the electoral structure of the City of Memphis and of the Board of Education of the Memphis City Schools in no way involves a State law of general application.

After denial of the request for a three-judge District Court, all defendants filed motions to dismiss

the Complaint on the grounds that the Complaint failed to state a cause of action upon which relief could be granted. A counter motion for summary judgment was filed by the plaintiffs. By order dated July 14, 1970, the District Court granted the motions of the defendants and dismissed the Complaint. (Petition for Certiorari p. 38). With respect to these defendants, this action was based on the Court's conclusions that, because of the forthcoming reapportionment of the City Council districts, the Complaint attacked an apportionment which would cease to be operative before the 1971 election. The Court further ruled that the other contentions of the plaintiffs were without merit. The Sixth Circuit Court of Appeals affirmed the action of the District Court for the reasons cited by Judge Brown (Petition for Certiorari, page 37).

ARGUMENT

A. Imbalance of Population Existing Among the Present City Council Districts will be Remedied Prior to the 1971 Elections.

The Complaint filed in this cause devotes most of its allegations to an attack on the apportionment by population of the existing district zone lines of these defendants. In support of its motion to dis-

miss, the defendant City of Memphis, and the defendant Board of Education of the Memphis City Schools showed that, in accord with Section 3 of the Charter of the City of Memphis, these zone lines would be redrawn in light of the 1970 Federal Census so that changes in population which would have taken place since the initial drawing of these zones would be taken into account and so that the zones would be as equal in population as possible. The applicable section of the Charter of the City of Memphis is as follows:

> "Section 3. **Re-Districting After Decennial Census.** BE IT FURTHER ORDAINED, That notwithstanding the provisions of the preceding Section of this Ordinance, a review and adjustment of the boundaries of said districts as originally established, or as thereafter changed, shall be completed not less than ninety (90) days prior to the next Municipal Election following the publication of the official decennial federal census and shall be as equal in population as practical."

As previously noted the Council so acted as evidenced by the ordinance dated June 22, set forth in the appendix.

As noted previously, the Private Acts constituting the Charter of the Board of Education of the Memphis City Schools, and particularly, Section 3 of Chapter 340 of the Private Acts of 1970 will incorporate by reference the zone lines of the City of Memphis and will automaically adopt any changes which are made to confirm to those zone lines to the 1970 census:

> "Section 3. Each of the seven (7) districts for the election of members of the Board of Education of the Memphis City Schools shall be the same districts as provided in the Charter of the City of Memphis, as from time to time amended, for councilmen of the City of Memphis as such districts exist on the final qualifications date for submission of nominating petitions to the Shelby County Election Commission prior to the municipal election in which such members of the said Board are elected."

The record before the District Court and the Court of Appeals also included an affidavit of the Chairman of the City Council of the City of Memphis indicating that the Council recognized and would perform its duty of reapportionment pursuant to Section 3 of the City Charter.

In attempting to attack the previously existing zone lines, therefore, the Plaintiffs, are in essence attempting to litigate a point which is moot. More important, they are attacking a system of periodic reapportionment which was specifically endorsed by the United States Supreme Court in the case of **Reynolds v Sims**, 377 U.S. 533, 12 L. Ed 2d 506. In that case it was expressly held that reapportionment of legislative districts following each Federal decennial census complied with Constitutional requirements:

> "While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such approach would clearly meet minimal requirements for maintaining a reasonably current scheme of legislalative representation." 377 U.S. at 583-4; 12 L. ed. 2d at 540.

These defendants can imagine no more unproductive waste of Court time than to be involved in a lengthy litigation of the City Council districts, where it is clear that these districts have been superseded by new districts prior to the election scheduled for October, 1971. With respect to the Board of Education of the Memphis City Schools, any issues relating to existing district lines set forth in

the complaint are even more irrelevant, since the Board of Education is presently elected at large and had no relationship to any district lines until after the required redrawing of the districts.

B. The Complaint Fails to Support its Allegations of Gerrymandered Districts.

In the section of the Complaint relating to "line gerrymander" the plaintiffs purport to attack the drawing of the specific lines of the legislative districts. They fail to allege, however, either that the district lines are unreasonably drawn or that they have been consciously drawn for the purpose of producing some invidious result. On the contrary, the Complaint alleges only that the City has engaged, "designedly" or not," in line gerrymandering. Defendants submit that an allegation of conscious misdrawing of zone lines to achieve some unconstitutional purpose is of the essence of a "gerrymander". See, for example, the definition of "gerrymander" given in **Black's Law Dictionary:**

> "GERRYMANDER. A name given to the process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish a sinister or unlawful purpose. . ."

It is to be noted that the Complaint alleges no purpose "sinister" or otherwise, which is to be effected by the so-called gerrymander. It also fails to allege that the districts of the City of Memphis are, in fact, drawn according to any standard other than normal political boundaries. In fact, the only allegation made in support of the Complaint's assertion of "line Gerrymander" is the Complaint's statement that two of the seven districts contain a majority of Negro voters. Defendants submit that this hardly constitutes an allegation on which a finding of "gerrymander" could be based.

In Connection with the Complaint's statement with regard to racial majorities in the City's electoral districts, it is interesting to note that Section E of the Complaint's prayers for relief does not request the drawing of racially-balanced districts but, rather, prays that these defendants be ordered to reconstruct the district boundaries as to recognize "relatively homogeneous communities such as Frayser and northeastern Shelby County, Whitehaven, Parkway Village and Fox Meadows, Orange Mound, North Memphis - Klondyke - Hollywood, Southwest Memphis and Levi, West Central Memphis, Highland Heights-Berclair, East Memphis, and other communities of such nature. . ." Each of the Communities mentioned in this prayer is readily identi-

fiable as predominant of one race or the other. It would appear that the Complaint, after unsuccessfully attempting to allege that the present electoral boundaries are gerrymandered by race, is asking the Court to require that the electoral districts of these defendants be drawn entirely along racial lines.

C. The Remaining Allegations Involve Complaints which are outside the Scope of Federal Constitutional Rights and which DO Not Involve Matters of which the Federal Courts Would Take Cognizance.

In addition to the Complaint's allegation respecting "registered voter gerrymandering" and "line gerrymandering", the Complaint embarks on the discussion of a number of matters which are entirely beyond the scope of cases dealing with either Constitutional protection against gerrymandering districts or the constitutional requirements of the one man—one vote doctrine. In these portions of the Complaint, the plaintiffs appear to object to the number of electoral districts instituted by the Memphis City Charter and by the Private Acts chartering the Board of Education of the Memphis City Schools. Defendants submit that Federal cases dealing with legislative apportionment and with all

other forms of electoral bodies have invariably respected the determination of State and local governments as to the proper size of each legislative body and that the number of City councilmen and school commissioners elected is not a matter which is cognizable by the Federal Courts.

Further, plaintiffs appear to rely on the statement in **Dusch v Davis,** 387 U. S. 112, at 117, as a prohibition against "oversize districts". In the context of that case, however, the word "oversize" refers to the fact that the district was not properly balanced with regard to population. It has nothing whatever to do with plaintiffs' contention that the Federal Courts should supervise the number of districts of which a given legislative body is to be composed.

The plaintiffs also appear to object to the fact that some City Councilmen and School Commissioners are to be elected from the City at large as a supplement to the election of Councilmen and Commissioners by district. In making this contention, the plaintiffs again stray outside the scope of issues which are cognizable by the Federal Courts. In. **Reynolds v Sims,** supra it was observed that "single member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member of floterial dis-

tricts." (377 U.S. at 579; 12 L. Ed. 2d at 537). The rule thus stated applies even more forcefully to the circumstances in the instant case where there will be no situation in which different voters would vote for different numbers of representatives. Unlike the situation which may prevail in State Legislative districts, the plan for both of these defendants will require that each voter votes for the identical number of representatives; that is, each voter will have the opportunity to case a vote for one district City Councilman and six at-large Councilmen and for one district School Commissioner and two at-large School Commissioners. Thus, the revision of the legislative boundary lines to adjust the boundaries to the results of the 1970 census results in absolute adherence to the principle of "one man—one vote".

The defendants submit, therefore, that the balance of the complaints which the plaintiffs have raised with regard to the legislative apportionment of these defendants raise no Federal constitutional issues. The fact that the plaintiffs would prefer some different electoral mechanism does not create a justiciable issue. The remaining allegations of the Complaint address themselves to defendants other than the City of Memphis and the Board of Education of the Memphis City Schools. These defendants are not proper parties for the litigation either of

the issues involving the electoral framework of the Shelby County government or the enforcement of the State laws relating to voting procedure, inasmuch as these matters are entirely outside the jurisdiction of either of these defendants.

CONCLUSION

For the reasons above stated, the defendant, City of Memphis and the defendant, Board of Education of the Memphis City Schools, respectfully submit that the Petition for Certiorari fails to set forth any cause of action on which relief could be granted and should be denied and that the order of the Sixth Circuit Court of Appeals dismissing the Complaint affirmed.

RESPECTFULLY SUBMITTED,

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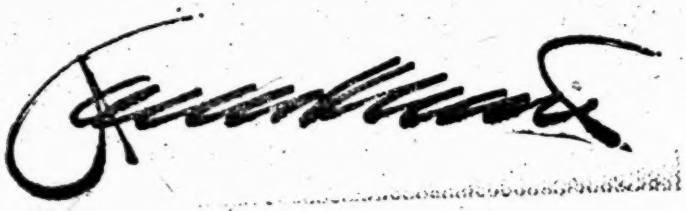
Memphis, Tennessee 38103

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed three copies of this Brief in Opposition to Petition for Writ of Certiorari to the Attorney for Petitioners, W. Slater Hollis, P. O. Box 80876, Memphis, Tennessee 38111, this 16th day of July, 1971.

James M. Manire



ORDINANCE

AN ORDINANCE TO AMEND SECTION ONE (1) OF THE HOME RULE CHARTER OF THE CITY OF MEMPHIS, ORDINANCE NUMBER 1852, AND ADOPTED AT AN ELECTION HELD NOVEMBER 8, 1966, AS AMENDED BY REDISTRICTING THE SEVEN (7) DISTRICTS SET FORTH IN SECTION ONE (1) OF SAID ORDINANCE AS AMENDED.

WHEREAS, Section 3 of the Home Rule Charter of the City of Memphis provides that the seven (7) Council Districts shall re re-districted after each Decennial Census.

SECTION 1: NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS that Section 1 of the Home Rule Charter of the City of Memphis, being Ordinance 1852 and adopted at an election November 8, 1966 as amended be further amended by striking the list of wards set forth in each of the seven (7) Districts described in Section 1 as amended, and substituting in lieu thereof new Wards assigned to Districts as follows:

DISTRICT ONE shall be and is composed of the areas encompassed by the following Wards:

Ward 42—Precinct 1
Ward 43—Precinct 1
Ward 43—Precinct 2
Ward 43—Precinct 3
Ward 43—Precinct 4
Ward 53—Precinct 1
Ward 53—Precinct 2
Ward 54—Precinct 2
Ward 62
Ward 63—Precinct 1
Ward 63—Precinct 2
Ward 69—Precinct 1
Ward 69—Precinct 2
Ward 70—Precinct 1
Ward 70—Precinct 2
Ward 71—Precinct 1
Ward 71—Precinct 2
Ward 72—Precinct 1
Ward 72—Precinct 2
Ward 72—Precinct 3

DISTRICT TWO shall be and is composed of the areas encompassed by the following Wards:

Ward 45—Precinct 3
Ward 46—Precinct 1
Ward 46—Precinct 2
Ward 46—Precinct 3

Ward 55—Precinct 1
Ward 55—Precinct 2
Ward 56—Precinct 1
Ward 56—Precinct 2
Ward 57
Ward 58—Precinct 1
Ward 58—Precinct 2
Ward 58—Precinct 3
Ward 58—Precinct 4
Ward 58—Precinct 5
Ward 64
Ward 65—Precinct 1
Ward 65—Precinct 2
Ward 66—Precinct 1
Ward 66—Precinct 2
Ward 67—Precinct 1
Ward 67—Precinct 2
Ward 67—Precinct 3
Ward 68—Precinct 1
Ward 68—Precinct 2
Ward 74—Precinct 1
Ward 80
Ward 81

DISTRICT THREE shall be and is composed of the areas encompassed by the following wards:

Ward 60—Precinct 5

Ward 73—Precinct 1
Ward 73—Precinct 2
Ward 73—Precinct 3
Ward 74—Precinct 2
Ward 74—Precinct 3
Ward 74—Precinct 4
Ward 76—Precinct 1
Ward 76—Precinct 2
Ward 76—Precinct 3
Ward 77—Precinct 1
Ward 77—Precinct 2
Ward 78—Precinct 1
Ward 78—Precinct 2
Ward 78—Precinct 3
Ward 79—Precinct 1
Ward 79—Precinct 2
Ward 79—Precinct 3

DISTRICT FOUR shall be and is composed of the areas encompassed by the following wards:

Ward 14—Precinct 2
Ward 26—Precinct 2
Ward 26—Precinct 3
Ward 29—Precinct 1
Ward 29—Precinct 2
Ward 29—Precinct 3
Ward 28—Precinct 1

Ward 28—Precinct 2
Ward 30
Ward 32
Ward 33
Ward 36—Precinct 1
Ward 36—Precinct 2
Ward 36—Precinct 3
Ward 37—Precinct 1
Ward 37—Precinct 2
Ward 38—Precinct 1
Ward 38—Precinct 2
Ward 38—Precinct 3
Ward 38—Precinct 4
Ward 40—Precinct 2
Ward 44—Precinct 1
Ward 44—Precinct 2
Ward 44—Precinct 3
Ward 44—Precinct 4
Ward 44—Precinct 5
Ward 45—Precinct 1
Ward 45—Precinct 4
Ward 52—Precinct 1
Ward 52—Precinct 2
Ward 52—Precinct 3
Ward 54—Precinct 1

DISTRICT SIX shall be and is composed of the areas encompassed by the following wards:

Ward 12
Ward 13—Precinct 1
Ward 13—Precinct 2
Ward 13—Precinct 3
Ward 24
Ward 25—Precinct 1
Ward 25—Precinct 2
Ward 25—Precinct 3
Ward 25—Precinct 4
Ward 34—Precinct 2
Ward 35—Precinct 1
Ward 35—Precinct 2
Ward 35—Precinct 3
Ward 49—Precinct 1
Ward 49—Precinct 2
Ward 50—Precinct 1
Ward 50—Precinct 2
Ward 60—Precinct 1
Ward 75—Precinct 1
Ward 75—Precinct 2
Ward 75—Precinct 3
Ward 75—Precinct 4
Ward 75—Precinct 5

DISTRICT SEVEN shall be and is composed of the areas encompassed by the following wards:

Ward 1
Ward 2

Ward 5
Ward 7
Ward 11—Precinct 1
Ward 11—Precinct 2
Ward 14—Precinct 1
Ward 18
Ward 20—Precinct 3
Ward 21—Precinct 1
Ward 21—Precinct 2
Ward 21—Precinct 3
Ward 22
Ward 23
Ward 27—Precinct 1
Ward 27—Precinct 2
Ward 39
Ward 40—Precinct 1
Ward 41—Precinct 1
Ward 41—Precinct 2
Ward 41—Precinct 3
Ward 42—Precinct 2
Ward 51—Precinct 1
Ward 51—Precinct 2

Reference is made to the Memphis Municipal Code as amended and to the Official Ward and Precinct Map of the City of Memphis in the office of the City Comptroller for a description of the wards and precincts hereinabove allocated to the

respective districts One through Seven. Annexed areas shall be assigned as future wards are described. Reference is also made to the minutes of the Quarterly County Court, Shelby County, Tennessee for resolutions establishing precinct lines. A map describing said Districts is filed with the Comptroller of the City of Memphis.

SECTION 2: BE IT FURTHER ORDAINED that this ordinance take effect from and after the date it shall have been passed by the Council, signed by the Chairman of the Council, certified and delivered to the office of the Mayor in writing by the Comptroller and become effective as otherwise provided by law.

Wyeth Chandler
Chairman of City Council

ATTEST:
David R. Hopper
Comptroller

THE FOREGOING ORDINANCE
No. 972 PASSED
1st Reading June 1, 1971
2nd Reading June 8, 1971
3rd Reading June 22, 1971

Approved Wyatt Chandler
Chairman of Council

APPROVED
Henry Loeb
Mayor, City of Memphis

I hereby certify that the foregoing is a true copy, and said document was adopted by the council of the City of Memphis as above indicated and approved by the mayor.

D. R. Hopper
Comptroller

SUPREME COURT, U. S.
71-3
Supreme Court, U.S.
FILED
AUG 2 1971

IN THE

Supreme Court of The United States

POP POPPENHEIMER, Individually,
and as the Legally Elected Representative
of Memphis and Shelby County Citizens,
Residents, and Taxpayers,
PLAINTIFFS-PETITIONERS

Vs.

THE STATE OF TENNESSEE, acting
through its agents and arms,
THE CITY OF MEMPHIS, TENNESSEE,
THE COUNTY OF SHELBY, TENNESSEE,
ET AL
DEFENDANTS-RESPONDENTS

RESPONDENT'S, COUNTY OF SHELBY, BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

C. CLEVELAND DRENNON, JR.
County Attorney For
Dedendant-Appellee
160 N. Main Street
Memphis, Tennessee 38103

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DEFENDANTS-RESPONDENTS

RESPONDENT'S, COUNTY OF SHELBY, BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

This brief is respectfully filed in behalf of the County of Shelby in opposition to the petition for writ of certiorari filed herein.

BASIC ISSUE

The basic issue presented by the Petition is whether the United States Court of Appeals for the Sixth Circuit was correct in affirming the ruling of the District Court in granting the County of Shelby's Motion to Dismiss for the reason that the question of reapportionment of the Quarterly Court of Shelby County is now res judicata by virtue of the decision in Hyden v. Baker, F. Supp. 475 (M. D. Tenn. 1968). (For convenience the parties will be referred to in accordance with their status in the trial court, that is Petitioners as "Plaintiffs" and Respondent County of Shelby as "Defendant").

II.

STATEMENT OF THE CASE

The defendant cannot accept the statement of facts of plaintiffs.

The plaintiffs in their original complaint stated that they were citizens, residents and taxpayers of the United States as well as citizens, residents and taxpayers of the County of Shelby and brought the action on behalf of themselves individually and on behalf of all other persons who are or who may become similarly situated in accordance with Rule 17 and Rule 23 (A) (3) respectively of the Federal Rules of Civil Procedure alleging that the Quarterly County Court of Shelby County was malapportioned.

The plaintiffs alleged that their constitutional rights were being violated and requested that the Quarterly County Court of Shelby County, Tennessee be reapportioned.

The defendant, County of Shelby, filed a Motion to Dismiss stating that the malapportionment of the Shelby County Quarterly Court had heretofore been adjudicated and the County of Shelby's Motion to Dismiss was sustained.

ARGUMENT

Did the District Court err in granting the County of Shelby's Motion to Dismiss for the reason that the question of reapportionment of the Quarterly Court of Shelby County is now res judicata by virtue of the decision in Hyden v. Baker 286 F. Supp. 475 (M. D. Tenn. 1968), which ruling was affirmed by the United States Court of Appeals for the Sixth Circuit? Appellee, County of Shelby, respectfully contends that both Courts were correct.

In the case of Hyden v. Baker 286 F. Supp. 475 (M. D. Tenn. 1968) (See footnote one at page 477), the Three-Judge Court was confronted with a complaint that was also brought by the respective plaintiffs in their own behalf and on behalf of all qualified voters in Shelby County and that Court made a determination that the respective plaintiffs may maintain under Rule 23 Federal Rules of Civil

Procedure the action as a class action on behalf of themselves and others similarly situated in their respective county.

The plaintiffs in Hayden v. Baker, supra, attacked the Shelby County Quarterly Court as then constituted and the Court held that the Shelby County Quarterly Court at that time was malapportioned and stated at page 485 as follows:

> "We hold, therefore, that the apportionment provisions of Article VI, Sec. 15, of the Constitution of Tennessee, T.C.A. Sec. 19-101, 19-102 and 19-103 and those portions of Chapter 421, Private Acts of 1919, and of Chapter 522, Private Acts of 1935, as amended by Chapter 166, Private Acts of 1939, relating thereto and consistent therewith, as applied to the apportionment of the Quarterly County Courts of Shelby and Washington Counties, are void as violative of rights secured by the Equal Protection Clause of the Fourteenth Amendment."

In order to correct the malapportionment as then existed the Three-Judge Court adopted the procedure stated as follows at page 485:

> "We are still of the belief that devising a constitutionally accepted method of apportioning representation on these local governmental units is more properly a legislative function than a judicial one. Accordingly, injunctive relief will not be or-

dered at this time. The General Assembly of Tennessee has just convened and it may well deal with this matter. Pending adjournment of the General Assembly jurisdiction will be retained, and, after such adjournment, the court will further consider the question of relief, if necessary."

The Shelby County Quarterly Court meeting in special session on August 7, 1968, pursuant to directions from the Three-Judge Court in Hyden v. Baker, supra, adopted a proposed plan for reapportioning the membership of the Shelby County Quarterly Court which was submitted for approval to the Three-Judge Court.

The Three-Judge Court by order dated September 3, 1968, (See Exhibit A) ordered as follows:

"A proposed plan was filed by the defendant August 14, 1968, and no objections have been filed On the contrary, plaintiffs have moved that the proposed plan be approved and that the court order an election to implement the plan.

"Upon consideration, the court is of the opinion that the proposed plan meets the requirements of the opinion heretofore rendered herein and it is, therefore, approved.

"To implement the plan, an election shall be held to fill the positions created thereby, such elec-

tion to be conducted November 5, 1968, in conjunction with the General Election of that date. Persons elected to the positions shall take office on January 1, 1969, and hold office until September 1, 1972, or until their successors are elected and qualified."

The Honorable District Court Judge was correct in granting the defendants' Motion to Dismiss and treating such motions as being in effect motions for summary judgment pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure in holding in his order as follows:

"With respect to the claim for reapportionment of the Shelby County Quarterly Court, we are of the opinion that such must be dismissed for the reason that this question is now res judicata by virtue of the decision in Hyden v. Baker, 286 F. Supp. 475 (M. D. Tenn. 1968). In that class action, the Court held that the Quarterly Court had been unconstitutionally apportioned and later approved the very plan of apportionment which is now in effect and which is being attacked by plaintiffs. Under the court order approved the apportionment, the members elected under such plan of apportionment are to hold office until September 1, 1972." (See Appendix No. II Plaintiff's brief page 39.

The General Assembly of the State of Tennessee

by Chapter 599 of the Public Acts of 1968 (Adj. S.), which is presently codified in the Tennessee Code Annotated at Section 5-111, has provided for the future apportionment and election of Justices of the Peace as follows:

"5-111. Apportionment and election of justices of the peace.—Prior to January 1, 1972, the county courts of the different counties shall meet and, a majority of the acting justices of the peace being present and concurring, shall change the boundaries of districts or redistrict a county entirely if necessary to apportion the justices of the peace among the districts substantially according to population, so as to provide for substantially the same number of persons per justice of the peace in each of the districts. At the August, 1972 election, justices of the peace shall be elected from the districts so provided.

"To determine the population within a district, United States census of population shall be used, but when United States census of population is not available the court may presume that the number of registered voters in a district is in direct proportion to the population within a district.

"Not later than each six (6) years following the first apportionment under the terms of this section, and each six (6) years thereafter the county courts, a majority of the acting justices of the peace being

present and concurring, shall apportion the justices of the peace among the districts substantially according to population.

"Upon application of any citizen of the county affected the chancery court of said county shall have original jurisdiction to review the county court's apportionment, and shall have jurisdiction to make such orders and decrees amending that apportionment to comply with this section, or if the county court fail to make apportionment, shall make a decree ordering an apportionment.

"The first and third paragraphs of this section shall not apply to any county which shall be districted and/or redistricted substantially according to population by private, special or local act by the eighty-fifth general assembly."

Defendant, County of Shelby, respectfully insists that the District Court and the United States Court of Appeals for the Sixth Circuit were correct.

CONCLUSION

For the reasons above stated, the defendant, County of Shelby, respectfully submits that the Petition for Certiorari fails to set forth any cause of action upon which relief could be granted and should be denied

and that the order of the Sixth Circuit Court of Appeals dismissing the Complaint should be appealed.

Respectfully submitted,

C. CLEVELAND DRENNON, JR.
County Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed two copies of the Brief to the Attorneys for all parties to the proceedings: namely: Mr. W. Slater Hollis, P. O. Box 80876, Memphis, Tennessee; Mr. James E. Swearengen, 2167 Chelsea Avenue, Memphis, Tennessee, Attorneys for Plaintiffs; Mr. James Manire, City Attorney, and Mr. Brady Bartusch, Assistant City Attorney, City Hall; Mr. Jack Petree, City Board of Education Attorney, and Ernest Kelly, Jr., Of Counsel, 900 Memphis Bank Building; Mr. Lee Winchester, Jr., Co. Bd. of Education Attorney, Suite 3200, 100 N. Main Building, all of Memphis, Tennessee, and Mr. David Pack, State Attorney General, Supreme Court Building, Nashville, Tennessee, this 30th day of July, 1971.

C. Cleveland Drennon Jr.

C. CLEVELAND DRENNON, JR.
County Attorney
Shelby County, Tennessee

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION.

LEE HYDEN, ET AL.
VS.
CHARLES W. BAKER, ET AL.

CIVIL NO. 4674

ORDER

By order entered July 1, 1968, this court directed defendant Quarterly County Court of Shelby County, Tennessee, to file with the court a proposed plan for reapportioning the membership of that body in compliance with the principles set forth in the opinion of the court in this action on February 13, 1968. It was directed that such proposed plan be filed on or before August 19, 1968, and it was further provided that, within ten (10) days after the filing of such plan, any party in this action would have the right to file objections thereto.

A proposed plan was filed by this defendant August 14, 1968, and no objections have been filed. On the contrary, plaintiffs have moved that the proposed plan be approved and that the court order an election to implement the plan.

Upon consideration, the court is of the opinion that

the proposed plan meets the requirements of the opinion heretofore rendered herein and it is, therefore, approved.

To implement the plan, an election shall be held to fill the positions created thereby, such election to be conducted November 5, 1968, in conjunction with the General Election of that date. Persons elected to the positions shall take office on January 1, 1969, and hold office until September 1, 1972, or until their successors are elected and qualified.

It is so ORDERED.

/s/ HARRY PHILLIPS
CIRCUIT JUDGE

/s/ WILLIAM E. MILLER
DISTRICT JUDGE

/c/ FRANK GRAY, JR.
DISTRICT JUDGE